AN EPITOME
OF
FEARNE
ON CONTINGENT REMAINDERS

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FEARNE

ON CONTINGENT REMAINDERS

AND

EXECUTORY DEVISES.

AN EPITOME

OF

FEARNE

ON CONTINGENT REMAINDERS

AND

EXECUTORY DEVISES.

Intended Principally for the Use of Students.

By W. M. C.

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PREFACE.

AN acquaintance with Fearne is indispensable to the student who desires to be thoroughly grounded in the common law relating to real property. This little work is intended to be a full and complete abstract of Fearne, and to serve as an introduction to the original work. It is designed primarily for the use of students; but it is hoped that it will not be without value to lawyers engaged in active practice. It contains all of Fearne's principles, separately and distinctly set forth. Under each principle is given a single, simple case, by way of example, in illustration. Then the writer has endeavoured to add such explanation as would give the student a clear and distinct view of the particular principle under consideration. He has aimed to reproduce Fearne's doctrines themselves, referring the reader to the original work for the reasoning upon which they are based. The writer has consulted, for the most part, Sanders, Butler and Hargrave, and has preferred to employ their language, as he has that of his author, when he has been able to do so.

AUGUST, 1878.

ANALYSIS.

INTRODUCTION.

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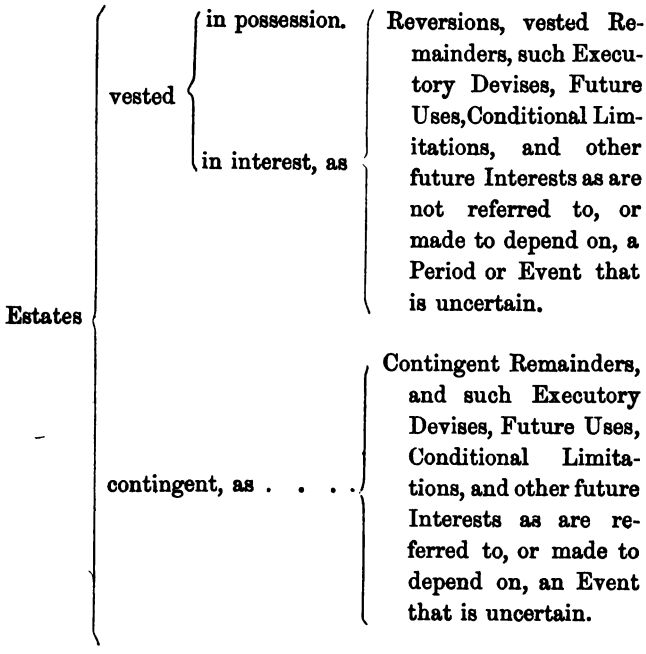
INTRODUCTION.

WHEN we consider estates with regard to the certainty and the time of the enjoyment of them, we may distinguish them into



An estate is vested when there is an immediate fixed right of present or future enjoyment.

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An estate is vested in possession when there exists a right of present enjoyment.

An estate is vested in interest when there is a present fixed right of future enjoyment.

An estate is contingent when a right of enjoyment is to accrue, on an event which is dubious and uncertain.

Contingent Remainders and Executory Devises are the professed subjects of the ensuing Work; in which however, other future interests are occasionally considered under their respective relations to the more immediate subjects of these two titles.

CHAPTER THE FIRST.

CONTINGENT REMAINDERS DEFINED AND DISTINGUISHED.

I.

SECTION THE FIRST.

DEFINITION OF A CONTINGENT REMAINDER.

1. A CONTINGENT REMAINDER is a remainder limited so as to depend on an event or condition, which may never happen or be performed, or which may not happen or be performed till after the determination of the preceding estate.

After the power of alienation became general, the tenant in fee simple might alien the whole fee, or he might carve it up into particular estates (*particula-particle*) and dispose of these at will.

Thus, if A. were tenant in fee, he might make a lease for ten years to B., after this, limit an estate to C. for life, then give an estate tail to D., with the final remainder to E. in fee. Or, the remainders might cease with B., C. or D., in which case the balance of the fee not disposed of would remain in A. as his reversion.

The example above given is an instance of vested remainders. For remainders are vested when there is an immediate, fixed right of future enjoyment. It is true that C. may die before the expiration of the lease

to B.; the remainder to E. in fee may never take effect, because the issue of D. may never fail; but the right is present and fixed. In contingent remainders, on the contrary, no right accrues until the event or condition upon which they depend happens or is performed.

The following elementary principles seem in place here, viz.:

1. The contingency upon which the remainder is made to depend must not be too remote.

2. A contingent remainder requires a vested estate of freehold to precede and support it.

3. A contingent remainder must vest either during the continuation of the preceding estate or at the instant of its determination.

4. Such determination of the preceding estate before the contingency happens as leaves no right of entry, destroys the contingent remainder thereon limited.

SECTION THE SECOND.

FOUR SORTS OF CONTINGENT REMAINDERS.

Under this definition we may properly distinguish four sorts of contingent remainders:—First, Where the remainder depends entirely on a contingent determination of the preceding estate itself. Secondly, Where the contingency on which the remainder is to take effect is independent of the determination of the preceding estate. Thirdly, Where the condition upon which the remainder is limited is certain in event, but the determi-

nation of the particular estate may happen before the contingency takes place. Fourthly, Where the person to whom the remainder is limited is not yet ascertained, or not yet in being.

II. 1. Where the remainder depends entirely on a contingent determination of the preceding estate itself:—

As if A. makes a feoffment to the use of B. till C. returns from Rome, and after such return of C. then to remain over in fee; here the particular estate is limited to determine on the return of C., and only on that determination of it is the remainder to take effect; but that is an event which possibly may never happen; and therefore, the remainder, which depends entirely upon the determination of the preceding estate by it, is dubious and contingent.

In the example here given, it will be observed that B.'s particular estate may expire in two ways: either at his death, or on the return of C. from Rome. Now it is intended that if B.'s particular estate determine by reason of C.'s return from Rome, then the fee limited over shall take effect; but that if B.'s estate determine by the death of B., then the fee limited over shall not take effect. Thus C.'s return from Rome determines the particular estate of B., and as C.'s return is uncertain or contingent, it is said that this class of contingent remainders depends entirely upon the contingent determination of the preceding estate.

II. 2. Where some uncertain event, unconnected with, and collateral to, the determination of the preceding estate, is, by the nature of the limitation, to precede the remainder :—

Thus, if lands be given to A. in tail, and, if B. come to Westminster Hall such a day, to B. in fee.

The coming or not coming of B. to Westminster on the day appointed does not in any wise affect the estate tail in A. In the first class of contingent remainders the happening of the event determines the particular estate; in the second class, the happening of the contingent event (B.'s coming to Westminster) vests his remainder without interfering in any manner with the estate of A.

II. 3. Where a remainder is limited to take effect upon an event, which, though it certainly must happen some time or other, yet may not happen till after the determination of the particular estate :—

As if a lease be made to J. S. for life, and after the death of J. D. the lands to remain to another in fee; now it is certain that J. D. must die some time or other, but his death may not happen till after the determination of the particular estate by the death of J. S.

The event upon which this class of contingent remainders depends is certain to happen; but it may not happen until after the determination of the particular

estate. It will be remembered that one of the elementary principles of contingent remainders is that the remainder must vest either during the continuation of the particular estate or at the moment of its determination. If the event does not thus take place, the remainder can never take effect.

II. 4. Where a remainder is limited to a person not ascertained, or not in being at the time when such limitation is made :—

As if a lease be made to one for life, remainder to the right heirs of J. S. ; now there can be no such person as the right heir of J. S. until the death of J. S. (for *nemo est heres viventis*), which may not happen till after the determination of the particular estate by the death of the tenant for life.

It may be remarked at the close of this section that a remainder over may be so limited as to depend upon any or all of the four kinds of contingencies above described.

SECTION THE THIRD.

DISTINCTION BETWEEN CONTINGENT REMAINDERS OF THE FIRST SORT, AND CONDITIONAL LIMITATIONS.

The true point of distinction between such conditional limitations over as are and such as are not remainders, in the strict sense of that word,

lies here: the former are limited to commence where the first estate is, by the very nature and extent of its original limitation, to expire or determine; whereas, the latter are limited so as to be independent of the measure or extent originally given to the first estate, and to take effect in possession, upon an event which may happen before the regular determination, to which that first estate is liable from the nature of its original limitation, and so as to rescind it. And in this latter case, it is the same thing whether the whole fee is disposed of in the first limitation or not.

A fee conditional at common law was a fee on condition that the feoffee had issue. If this condition was unfulfilled, it was the right of the grantor to enter for the condition broken, and by so doing, divest the seisin he had made at the creation of the estate, and re-invest himself of the fee. The feoffee had an estate in fee simple; but this estate was to be defeated and to determine on the non-fulfillment of the condition, viz.: having issue. Thus the condition defeated the estate, cut it off, prevented that estate which the feoffor had contemplated from taking effect.

In the same manner it is if a lease for life be made to A. upon condition that he should intermarry with B. within five years. The estate contemplated and intended to be conveyed by the lessor is an estate which the lessee shall enjoy for the term of his life, but if the lessee, A., fails to perform the condition, by not intermarrying with B. within five years, then the estate contemplated and intended is defeated. On the other

hand, if A. perform the condition, his life estate flows on and fills the measure and extent given to it originally, and continues until its regular and natural expiration.

Now it is a well-settled rule of law that a remainder must await the natural expiration of the preceding estate. It follows, therefore, that if a condition cuts off and defeats a preceding estate before it arrives at its natural expiration, a remainder cannot be limited to take effect upon such a condition.

It is quite different where an estate is limited to the use of A. until B. return from Rome, and then, upon B.'s return, to remain to the use of C. in fee. In this case, it is considered that whether A.'s estate (which being uncertain is an estate for life) expire at the death of A. or on the return of B. from Rome, it expires in either event at its natural termination. It is considered that the grantor viewed the two possible determinations with indifference, and that the expiration of the estate on either—the death of A. or the return of B. from Rome—filled the original extent and measure of the estate which he created.

So if lands be granted to A. so long as he shall continue unmarried, and if he marry, to B. in fee, here the estate expires naturally either in the event of A.'s marriage or death, and a remainder may be limited on the contingency.

Note the following: An estate is limited to A. for life, but on this condition, that if B. return from Rome, then the estate is to remain to C. in fee. Again: an estate is limited to A. until B. returns from Rome, and then to C. in fee. In both instances the estate to A. determines on the return of B. from Rome. But in the first case,

the grantor was obliged at common law to enter for the condition broken, in order to defeat the estate. This entry would put the grantor or his heirs in, as of their old estate, and by divesting the seisin (which is done by the entry), all the subsequent estates would fall. Such a limitation was void at common law, though it is operative under the Statute of Uses. In the second case, the limitation to C. is a good remainder, for the reason above given—its awaiting the natural expiration of the preceding estate.

It will be observed that in different forms of expression, conveying to all apparent intents and purposes the same intention, some are construed to mean a conditional limitation and some to mean a contingent remainder.

To sum up. The point of resemblance between conditional limitations and contingent remainders is, that the preceding estate is determined by a contingency in both; and the difference is, that a contingent remainder awaits the natural expiration of the preceding estate, while a conditional limitation does not. An important practical distinction between them is that contingent remainders are barrable where conditional limitations are not.

SECTION THE FOURTH.

EXCEPTION FROM THE THIRD CLASS OF CONTINGENT REMAINDERS.

In some cases of a limitation for a long term of years, as eighty years or upwards, determinable on the life of a person then in being, with remainder over on the death of that person, to a person *in esse* (as a limitation to A. for eighty years, if

B. shall so long live, with remainder over after the death of B. to C. in fee), it has been held that notwithstanding the remainder over is in this case limited to take effect on an event (viz., the death of B.) which possibly may not happen till after the expiration of the preceding estate for eighty years, yet as the chance against such event happening before the expiration of the preceding term is exceedingly small, such remainder shall be considered as vested; and that the mere possibility that a life in being may endure for eighty years to come does not amount to a degree of uncertainty sufficient to constitute a contingent remainder.

The third class of contingent remainders were defined to be, where the event upon which the remainder was made to depend must certainly happen, but might not happen until after the expiration of the particular estate. As if lands be limited to A. for life, and after the death of A. and B., to C. in fee. Here the death of B. at some time is a certain event: but as it may not happen until after the determination of A.'s estate by A.'s death, the remainder is contingent. Now if an estate had been limited to A. for ninety-nine years, if he should so long live, and after his death to B. in fee, the remainder to B. would be a vested remainder; for it is not to be supposed that A. will outlive the ninety-nine years, upon which event alone the remainder to B. shall fail to take effeet.

The case of Napper and Sanders is the leading case on this point. There, A. made a feoffment to the use

of herself for life, and after to the use of the feoffees for eighty years, if B. and C. his wife should so long live, and if C. survived B., then to the use of her for life, and after the decease of C. to the use of D. in tail, with other remainders over. Two points were considered in this case: 1st. Whether the remainder limited to the use of D. in tail with the other remainders over depended for taking effect upon C.'s surviving her husband. 2d. Supposing that these subsequent remainders were to take place at C.'s decease whether she survived her husband or not, then were they not contingent remainders on the ground that B. and C. might both outlive the term of eighty years, in which case the particular estate would expire by effluxion of time before the remainders could vest? It was resolved by all the court that these remainders were not contingent, but vested presently; though it was agreed that C.'s estate for life was contingent on the event of her surviving her husband.

SECTION THE FIFTH.

EXCEPTION FROM THE FOURTH CLASS OF CONTINGENT REMAINDERS.

These (exceptions) will be found to be much more numerous, as they depend, on one hand, on a general rule of law respecting limitations to the heirs general or special, where the ancestor takes an estate of freehold in the same conveyance; and on the other, upon the respect which is paid to the intent of a testator, where it can be plainly collected from his will that he used

the words "heirs of the body, &c.," as a *descriptio personæ.*

Upon the first of these grounds we are to observe that, whenever the ancestor takes an estate of freehold, or frank tenement, and an immediate remainder is thereon limited in the same conveyance to his heirs, or heirs in tail, such remainder is immediately executed in possession in the ancestor so taking the freehold, and therefore is not contingent or in abeyance; as an estate for life to A., remainder to the heirs of his body; this is not a contingent remainder to the heirs of the body of A., but an immediate estate tail in A. So, likewise, wherever the ancestor by any gift or conveyance takes an estate of freehold, and there is afterwards in the same gift or conveyance a limitation to his right heirs, or heirs in tail, after some other estate for life or in tail interposed between his freehold and such limitation to his heirs, this remainder to his heirs vests in the ancestor as a remainder, and shall not be in contingency or abeyance. As a lease for life with divers remainders over, remainder to the right heirs of first lessee for life, this is a remainder in fee vested in the first lessee for life; and after his death, and the determination of the mean remainders, his heir shall be in as heir, and not as purchaser. So where land is given to A. for life, remainder to B. for life, remainder to the heirs male of the

body of A., who has two sons, the eldest has issue a daughter, and dies, A. and B. die, the youngest son shall have the land as heir male; which proves that he takes by descent, and not by purchase, and consequently the estate tail vested in the father; for had the younger son taken by purchase, he must, according to the old doctrine, have been complete heir general as well as heir male, which two characters could not be united in him during the life of the eldest son's daughter.

The point of identity common to the fourth class of contingent remainders and the class of exceptions given in this section is, that the person who shall succeed to the estate after its enjoyment by the preceding tenant is uncertain. The point of difference is, that in one case the person who takes the ulterior limitation takes it by purchase, and in the other case he takes by descent. This class of exceptions are excluded from contingent remainders under the operation of what is known as the rule in Shelley's case, which is, that where an estate of freehold is limited to a person, and after to "his heirs" or "the heirs of his body," the inheritance is held to be immediately executed in the ancestor, and "his heirs" or "the heirs of his body" take by descent and not by purchase.

In the next succeeding sixteen paragraphs, Mr. Fearne treats of the operation of the rule in Shelley's case as applied to legal limitations in deeds.

V. 1. Effect of the rule in Shelley's case, where the estate of freehold limited to the ancestor is determinable

on an event which may happen in his lifetime; as to one man during the life of another, or to a woman during coverture.

Thus an estate limited to the use of A. during the life of B., and after the death of B. to the heirs of A. in fee; or an estate to A. during her coverture, and after the death of her husband to the heirs of A. In the first case, B. may die during the life of A., and then by the limitation A.'s freehold is determined; and as *nemo est heres viventis*, there can be no heir to take the remainder in fee. The second case is identical: A.'s husband may die during her lifetime, and until her death, there are none who can take as her heirs. In these cases what becomes of the limitations to the heirs after the expiration of the estate *per auter vie* in the ancestor? Rolle says that where an estate of frank-tenement is thus limited to the ancestor, the limitation to the heirs is in abeyance. But this doctrine is directly contradicted by the authority of Lord Coke, where he says, if land be given to A. and B. so long as they shall jointly together live, the remainder to the right heirs of him that dieth first, and warrant the land in *forma predicta*, A. dieth, his heir shall have the warranty; and yet the remainder vested not during the life of A., for the death of A. must precede the remainder; and yet shall the heir of A. have the land by descent. In these cases, the rule in Shelley's case prevails, and the remainder attaches in the ancestor in three different modes, viz.: 1st. Where there is a limitation to A. for life, or any other estate of freehold, and an immediate remainder to his heirs general or special; here the remainder fuses and blends with A.'s estate for life, and

he has an estate of inheritance executed in possession. 2d. If there be an estate to A. for life, or any other freehold, remainder to B. for life, remainder to the heirs of the body of A., this is only a present freehold in A., with a vested remainder to him in tail, to take effect in possession after the determination of B.'s estate. 3d. In the case above cited from Lord Coke, the remainder attaches in the ancestor as a contingent remainder which his heirs take by descent.

It may assist the mind in arriving at a clearer conception of these kinds of limitations—and indeed of all other matters where the doctrine of descent is involved—to reflect that, in the contemplation of law, an ancestor and his heirs form one ideal line, unbroken and undisturbed by the death of any individual who happens for the time being to represent a portion of it. "The king never dies," is a maxim of the common law. In the same manner an ancestor never dies. His heir is merely his continuation. The individual passes away; the line remains. What attaches in the ancestor attaches and continues in the line. When the heir takes his place in the line, whatever had attached in the line finds expression in him, and takes effect in and through him.

V. 2. Effect of the rule in Shelley's case, where the limitation to the heirs, or the heirs of the body, of the ancestor taking the preceding freehold, is contingent.

The case above cited from Lord Coke, of a gift to two for their joint lives, remainder to the heirs of the one dying first, is an example under this class. The contingency or point of uncertainty in this case is, who shall die first? During their joint lives the estate tail remains suspended in equilibrium between them. There

is an equal possibility to each. But at the moment that one of them dies, the estate which was before in contingency at once vests by descent in the line of heirs of the person dying.

V. 3. Effect of the rule in Shelley's case, where the ancestor's estate of freehold is limited to him in trust for some other person, or to answer some particular purpose.

As a limitation to the use of A. during the life of B., in trust for B., or to pay her the rents and profits during life, remainder to the use of the heirs of the body of A. Mr. Fearne is strongly of the opinion that such a limitation does not fall under the rule in Shelley's case, and that, consequently, the heirs of the body of A. take a vested remainder in tail by purchase. Mr. Preston and Mr. Butler, on the contrary, are of the opinion that courts of law can only consider the legal freehold vested in A., which, consequently, brings the limitation under the rule in Shelley's case.

V. 4. Effect of the rule in Shelley's case, where there is a joint limitation of the freehold to several, followed by a joint limitation to them of the inheritance in fee simple.

In an estate limited to A. and B. for their lives, remainder in fee simple to their heirs, the fee vests in A. and B. jointly. If the limitation of the freehold be to baron and feme jointly, remainder to the heirs of their bodies, it is an estate tail executed in them, as they are capable of issue, to whom such joint inheritance can descend.

V. 5. Effect of the rule in Shelley's case, where the limitation of the freehold is not joint, but successive.

In this case Mr. Fearne remarks: "If the limitation of the freehold be not joint, but successively, as to one for life, remainder to the other for life, remainder to the heirs of their bodies; there it seems the ultimate limitation is not executed in possession, but gives them a joint remainder in tail. And if the limitation of the inheritance be to several men or to several women in tail, instead of fee simple, though the freehold be to them jointly, they take several estates of inheritance; because they cannot have issue between or among them, as a man and woman may. And the same rule extends to other cases, where the relative situations of the grantees render the possibility of issue between or among them more remote than what is termed a simple or common possibility, or else is inconsistent with the laws of marriage.

"If the particular estate be to A. and B. for their lives, and after their deaths to the heirs of B.; or to husband and wife, and the heirs of the body of the husband; or to two men and the heirs of their two bodies, or the heirs of the body of one of them,—the estates in tail or in fee are said to be executed *sub modo;* that is, to some purposes, though not to all. For though they are so far executed in or blended with the possession as not to be grantable away from or without the freehold by way of remainder, yet they are not so executed in possession as to sever the jointure, or entitle the wife of the person so taking the inheritance to dower; and in the said case of a limitation to husband and wife, and the heirs of the body of the husband, his wife having a

joint estate of freehold with him, and there being no moieties between them, a recovery against him with single voucher will not bar the issue or remainder; though his estate tail has been held to be so executed in possession, that his feoffment was a discontinuance."

V. 6. Effect of the rule in Shelley's case, where contingent limitations intervene between the preceding freehold and the subsequent limitation to the heirs.

Take the case of a limitation to baron and feme for their lives, remainder to the first and other sons of the marriage successively in tail, remainder to the heirs male of the bodies of baron and feme. The estate tail is executed in the baron and feme *sub modo*. It is executed only till the birth of the first son, and then the estates—for life and remainder—till now united, open to let in the intervening remainders; when baron and feme become tenants for their lives, with a joint remainder in tail, expectant on the intervening limitations to the first and other sons.

The estate tail is said to be executed when the remainder limited to the "heirs of the body, &c.," merges or drowns the freehold estate limited to the ancestor. In this event the ancestor is absolutely tenant in tail. Where limitations intervene between the estate of freehold limited to the ancestor and the remainder limited to the heirs of his body, the ancestor's freehold is not absolutely merged by the remainder; and the estate tail is said to be executed *sub modo* only.

In the case given above, the limitation to baron and feme was a joint limitation, and the limitation to the heirs of their bodies was likewise joint. Both limita-

tions being joint, the estate tail was executed *quodam modo* in baron and feme. There is an essential difference where the limitation is to baron for life, remainder to feme for life, remainder to the heirs of their bodies; for here, the limitations to baron and feme being several, and the limitation to their heirs being joint, they take several estates for life, with a joint remainder in tail.

V. 7. Effect of the rule in Shelley's case, where a limitation to the feme for life is followed by a remainder to the heirs of the body of baron and feme.

The rule in Shelley's case does not apply here, and the limitation over is a contingent remainder. Mr. Fearne reasons as follows: "This is no remainder in the feme, for the freehold is limited to her alone; and as the person who is to take in remainder must be heir of both their bodies, if the feme should die before the baron, there can be no one to answer that description when the particular estate determines, because the baron cannot have an heir during his life, nor could it be involved or flow into the limitation to the feme herself, as not being confined to her own heirs; therefore the remainder is in contingency."

V. 8. Effect of the rule in Shelley's case, where the freehold results to the ancestor by implication.

It is a principle of law that so much of the use as the owner of the land does not dispose of remains in him. A. seized in fee, covenanted to stand seized to the use of his heirs male begotten, or to be begotten, on the body of his second wife. There was no express limitation of an estate for life to A., but an estate for life

resulted to him according to the principle of law laid down. The rule in Shelley's case applies, and the subsequent limitation to his heirs male, &c., was executed in an estate tail in A.

V. 9. Effect of the rule in Shelley's case, where the estate limited to the ancestor is equitable, and the limitation to the heirs carries the legal estate.

Where this is the case, the two estates will not blend and incorporate into an estate of inheritance in the ancestor. In the case of Tippin *v.* Cosin, the estate was limited to the use of trustees and their heirs during the life of E. C., upon trust, to permit and suffer him to take the profits, remainder to the first and other sons of the marriage, &c., remainder to (the use of) the heirs of the body of E. C. It was contended that the limitation of the profits to E. C. during his life was an estate executed in him by the statute; yet the court denied that, and adjudged that the limitation to the heirs of the body of E. C. operated as a contingent remainder.

V. 10. Effect of the rule in Shelley's case, where the estate limited to the ancestor is legal, and the estate limited to the heirs is equitable.

Neither does the rule in Shelley's case prevail in this class of cases. Where the equitable estate is limited for life to the ancestor, and the equitable remainder to his heirs, &c., equity (which follows the law) will apply the rule. But where one of the limitations is legal and one is equitable, neither a court of law nor a court of equity takes cognizance of both, and, consequently, the estates must remain disunited.

V. 11. Effect of the rule in Shelley's case, in limitations upon surrenders of copyholds.

The rule in Shelley's case prevails equally in limitations upon surrenders of copyhold as in freehold lands, subject to the distinction in the following paragraph.

V. 12. Effect of the rule in Shelley's case, in limitations of copyhold estates, to the heirs of the surrenderor, without a limitation of a life estate or of any other freehold estate to the surrenderor himself.

We have seen that in freehold lands, the ancestor could take a freehold by implication, so as to execute the estate of inheritance in him, where there was a subsequent limitation to his heirs, &c. But it is to be observed that upon a surrender of a copyholder in fee to his own heirs general, there must be an express limitation of the freehold to the ancestor to make his heirs take by descent. If there be no such express limitation to the ancestor, the rule in Shelley's case is avoided, and the heirs take by purchase.

V. 13. Effect of the rule in Shelley's case, where there is a limitation to a person's heirs in one deed or instrument, and he acquires the freehold by another.

The rule is that the ancestor and the heir must both take by the same instrument or conveyance, otherwise the rule in Shelley's case does not apply. This doctrine is carried so far, that where a father settled on his son, in his lifetime, an estate for life by deed, and after devised to the heirs male of his said son's body, it was held that the two estates did not unite, and that the

heirs male of the son took by purchase. In this case both conveyances were voluntary, and both moved from the same person.

V. 14. Effect of the rule in Shelley's case, where an estate is limited to one for life, by deed, and the estate is afterwards limited to the heirs of his body, under the execution of a power of appointment contained in that deed.

Take the case of a limitation to the use of A. for life and after his decease to such uses as B. shall appoint, who afterwards, in A.'s life, appoints the use to the right heirs of A.

In this case, the act of B. in making the appointment is the act of the grantor himself, in the contemplation of law; for it is a settled rule that the limitation of an use under an execution of a power of appointment contained in a conveyance to uses, in general, operates as an use created by, and arising under, that conveyance itself. So that in this case the estate of freehold and the subsequent limitations are both contained in the same conveyance. Hence the rule in Shelley's case applies.

V. 15. Explanation of the expression, "words of purchase," as distinguished from that of "words of limitation," in the cases to which the rule in Shelley's case is considered to apply.

The rule in Shelley's case, as given by Lord Coke, is in the following terms, viz.: "Where the ancestor takes an estate of freehold by any gift or conveyance, and in the same gift or conveyance there is a limitation, either

mediate or immediate, to his heirs or the heirs of his body, the word heirs is a word of limitation of the estate, and not of purchase."

Where the words "heirs" or "heirs of his body" are construed as words of limitation, they indicate the quantity of the estate created in the ancestor. In an estate granted to A. and the heirs of his body, the words "heirs of his body" are words of limitation; they indicate the quantity of the estate vested in A. In a feoffment to A. and his heirs, the word "heirs" is also a word of limitation, and indicates the quantity of the estate vested in A.—a fee simple. Now where a freehold is granted to A. in the first instance, and afterwards, either immediately, or after intervening remainders, the estate is given to the "heirs of A.," or "the heirs of the body of A.," these words are words of limitation in precisely the same sense that they are words of limitation where the conveyance is made to A. and his heirs, or to A. and the heirs of his body, without an express limitation of any preceding estate of freehold to A. And they operate precisely in the same manner. The heirs take by derivation and descent from A., as being contained in A. when the grant was made, and they do not take under any right accruing to them from the grantor. All this is included in the expression "they take by descent."

Thus, where the words "heirs," &c., are construed to be words of limitation, the estate attaches originally in the ancestor; but where the same words are construed to be words of purchase, the estate commences originally in the heir (the word "heir" being here a *descriptio personæ*) by virtue of the conveyance or gift. It makes

him the *propositus* or original stock from which the inheritance is to be transmitted in its subsequent devolution.

V. 16. Effect of the words "heirs male of the body, &c.," where they operate as words of purchase.

Suppose a limitation to the heirs male of the body of B. (no estate being in B. himself or conveyed to him), does the heir male of B., who takes the estate, take it by descent or by purchase? It is held that he takes it originally by purchase; but that the estate follows the same course of devolution as if he had taken it by descent as heir male of the body of B. Lord Hale calls it a *quasi* entail.

Here Mr. Fearne concludes his discussion of the rule in Shelley's case as applied to legal limitations in deeds. After some observations on the supposed origin of the rule in Shelley's case in the next paragraph, he considers the rule as applied to equitable limitations in deeds and wills in paragraphs 18 and 19, then devotes the rest of the section to the discussion of the application of the rule to legal limitations in wills.

V. 17. The supposed origin of the rule in Shelley's case.

The rule has generally been considered of feudal origin, and introduced to prevent frauds upon the tenure. Mr. Justice Blackstone was inclined to think that it was established to prevent the inheritance being in abeyance; another ground might be, he thought, to facilitate alienation in favour of commerce, in direct antagonism to

feudal principles. Mr. Hargrave supposes the rule to owe its origin to that policy of the law which was intended to prevent annexing to a real descent the qualities and properties of a purchase. In reviewing these opinions, Mr. Fearne himself remarks, "But if the recorded antiquity of the rule, if its adoption and prevalence during a period of near five hundred years (reckoning from the case 18 Ed. 2, cited by Judge Blackstone), have not yet stamped it with legal sanctity, nor entitled it to the attention and observance due to an established rule of law; vain, I am afraid, will be any resort to its origin or principles, at a period when they are confessedly either too remote or too latent for any more energetic influence than what they can derive from the researches of learning or the conception of hypothesis."

V. 18. Effect of the rule in Shelley's case, on equitable limitations in marriage articles.

In this paragraph Mr. Fearne begins the second branch of his discussion of the rule, viz.: its application to equitable limitations. The present paragraph is confined to its operation in marriage articles.

The rule is not applied with the same rigour in courts of equity as in courts of law. In marriage articles and in most trust estates, regard is rather had to accomplish the results aimed at in the articles and to effect the intent of the trusts than to construe according to the strict legal operation of the words.

Thus in the case of articles before marriage, for making a settlement, if there be a limitation to the parents for life, with a remainder to the heirs of their

bodies, the general rule is to construe the latter words as words of purchase, and to decree the settlement accordingly.

In fact, articles made before marriage are not considered as a formal conveyance or declaration, but merely as minutes or points directing how the subsequent settlement shall be made, or rather indicating the objects to be accomplished by such settlement. Hence, courts of equity will decree a conveyance which will effectuate the purposes which seem to be intended in the articles. If, however, the settlement itself be made before marriage, the strict legal import of the words will prevail, and equity will not interfere, unless the settlement is expressed to be in pursuance of the articles; for the court will suppose that by the settlement, the parties changed their minds, which they had a right to do before marriage, and that the settlement was made to carry out this changed intent. The principal object in such settlements being to provide for the issue, equity inclines to favour their interest.

V. 19. Effect of the rule in Shelley's case, in other kinds of equitable limitations than marriage articles.

First take a distinction between trusts executed and trusts executory. Trusts seem to be executed when the conveyance to the trustees is final, and no other duty remains in them than to render to the *cestui que trusts* the actual rents and profits of the lands conveyed. Trusts seem to be executory where the trustees are directed and empowered to make future conveyances to accomplish certain results. A limitation to trustees and their heirs for A. for life, remainder after the death of

A. to the heirs of the body of A., would be a trust executed, and the rule in Shelley's case would apply. The rule would also apply in an immediate devise. But where lands were devised to trustees to pay debts and legacies, and afterwards to settle what should remain unsold, one moiety to the testatrix's son H. and the heirs of his body by a second wife, with remainder over; and the other moiety to the testatrix's son F. and the heirs of his body, with remainder over, taking special care in such settlement that it should never be in the power of either son to dock the entail; in this case the trust was executory, and the court held that the rule in Shelley's case did not apply, and the two sons took but estates for life. But even in these executory trusts, there must be some clause repugnant to the nature of an estate tail, to prevent the operation of the rule.

V. 20. Perrin and Blake.

The case was this: One W. Williams, seized in fee of a plantation in Jamaica, devised in the following words: "Should my wife be enceinte with child at any time hereafter, and it be a female, I give and bequeath unto her the sum of £2000, &c.; and if it be a male, I give and bequeath my estate, real and personal, equally to be divided between the said infant and my son John Williams, when the said infant shall attain the age of twenty-one. Item: it is my intent and meaning that none of my children shall sell or dispose of my estate for longer time than his life, and to that intent I give, devise and bequeath all the rest and residue of my estate to my son John Williams and the said infant for and during the term of their natural lives, the remainder to

my brother-in-law J. G. and his heirs, for and during the lives of my son John Williams and the said infant, the remainder to the heirs of the body of my said sons John Williams and the said infant, lawfully begotten or to be begotten, the remainder to my daughters," &c. No other son was born, and the question was, what estate John Williams took under the will? The Court of King's Bench adjudged that John Williams took only a life estate.

Mr. Fearne contends in this paragraph that until this case, A.D. 1769, there was no decided case where a perfect legal limitation in a deed or will to the heirs or heirs of the body, in the plural number (unqualified by any concomitant limitation to sons, daughter or children), preceded by a limitation of the legal estate for life to the ancestor, in the same deed or will, had been held not to attach in that ancestor, but to go to the heir by purchase.

V. 21. The propriety of the determination of the judges of King's Bench in Perrin and Blake.

Mr. Fearne thinks that the determination of the court in this case, running as it does against the whole stream of judicial decisions on the same subject, is much to be regretted.

V. 22. In this paragraph Mr. Fearne discusses the cases anterior to that of Perrin and Blake, to show that the rule in Shelley's case ought to have been applied in Perrin and Blake.

V. 23. The arguments used in the Court of King's

Bench in support of the determination in Perrin and Blake are discussed in this paragraph.

V. 24. This paragraph discusses the cases subsequent to that of Perrin and Blake on limitations literally falling under the rule in Shelley's case.

This paragraph closes the discussion of Perrin and Blake. The determination of the judges in King's Bench was reversed in the Exchequer Chamber. The case was carried to the House of Lords, but it was compromised, and the writ of error was withdrawn on leave.

V. 25. Effect of the rule in Shelley's case, where there is a limitation to the ancestor for his life, and a subsequent limitation to the heir of his body, in the singular number, without words of limitation superadded.

An estate to A. for life, remainder to A.'s next heir male, and in default of such heir male, then to remain, is an example under this class, without words of limitation superadded. An estate to A. for life, remainder to A.'s next heir male and the heirs male of such next heir male, is an example under this class with words of limitation superadded.

Wherever the estate conveyed is so limited as to take it out of the regular course of devolution by descent, there the rule in Shelley's case does not apply. In the first example, the limitation ceases with the first heir male, who would have taken by descent, and the estate would have devolved through him, down the regular line of special heirs. In the second example, the limitation goes further, and says who shall take after the next

heir, thus breaking the regular line of descent and guiding the estate in another direction.

In the first example, the rule in Shelley's case applies. In the second, where the intent is plainly and properly expressed to create a different line of devolution from the line of descent, the rule does not apply.

V. 26. Effect of the rule in Shelley's case, where, after a limitation to the ancestor for life, and a subsequent limitation to the heirs of his body, in the plural number, words of limitation are superadded.

Where the limitation is to the "heirs of the body" ("heirs," in the plural number), even if subsequent words of limitation follow, the rule in Shelley's case applies, unless the subsequent words point out a devolution inconsistent with the nature of the descent indicated by the first words.

Shelley's case itself is a direct and leading authority. The case was this:

Edward Shelley was tenant in tail, having two sons, H. and R. H., the eldest, died in his father's lifetime, leaving a daughter, and his (H.'s) wife enceinte with a son. Edward, the father, suffered a common recovery to the use of himself for the term of his life, and after his decease to the use of certain persons for twenty-four years; and after to the use of the heirs male of the body of the said Edward, lawfully begotten, and of the heirs male of the body of such heirs male, lawfully begotten, remainder over. After judgment and the award of the writ of seisin, but before its execution, Edward died; and after his death, and before the birth of his eldest son's son, the writ of seisin was executed, and his

youngest son, R., entered; and a son of the eldest son being afterwards born, the question was, Whether his entry upon his uncle was lawful or not?

It was resolved that R. came in by descent.

V. 27. Present extent and prevalence of the rule in Shelley's case, in the construction of limitations contained in deeds and marriage articles.

The rule operates strictly in conveyances of legal estates by deed; and it yields in marriage articles to the intent to be effectuated in the settlement. In regard to dispositions by will, the conclusions are not so well determined.

V. 28. Present extent and prevalence of the rule in Shelley's case, in the construction of limitations contained in wills.

Mr. Fearne remarks: "The cases as well as principles tell us, the controlling rule of construction in wills is the intention expressed, or clearly implied; to contradict this would indeed be a mockery, a denial of the import of the word will. On this broad ground, some have driven the rule in question to a distance that would in effect reduce it to no rule at all, by subjecting it to the control of any expression not perfectly reconcilable with a positive intention of its admission; whilst others have, with a rigid decree of legal sternness, insisted on an inflexible adherence to the rule, without regard to any implication contraventive of its effect. It is obvious that neither of these doctrines is reconcilable with the train of decisions which must, I conceive, be

held to have pronounced the law on this point; those decisions (if I do not mistake them) neither bend the rule to nor support it against every expression or manifest indication of contrary intention. The one would be absolutely discarding it as a rule of construction in wills, the other would be rendering the legal effect of certain technical words in the very first line of a will, irrevocable through the whole sequel of it.

"The amphibolous tendencies of cases and principles seem to conspire in the production of a question, the solution of which may, by professional gentlemen, be truly termed the *hic labour*, the *hoc opus*. To attempt it with precision seems vain, until we can reduce all possible expressions of intention to certain classes or degrees of relative force; then indeed might we ascertain on a standard scale what degrees of express or implicative indications of intention were below and what above the controlling index of the rule; whilst that is out of our reach, what can we do more than resort to some general inferences, afforded by the comparison of the several cases in which the intention has been allowed to control the rule?"

SECTION THE SIXTH.

FURTHER EXCEPTIONS FROM THE FOURTH CLASS OF CONTINGENT REMAINDERS, WHERE THE WORDS "HEIRS OF THE BODY, &C." ARE A DESCRIPTIO PERSONÆ.

VI. 1. These are grounded upon that respect and attention which (within certain bounds, and where it contravenes no rule of law) is paid to the intent of a testator, wherever it can be col-

lected from any particular expressions of his will; the cases wherein a limitation in a devise to the heir special of a person living has been adjudged a *descriptio personæ*, or sufficient designation of the person for the remainder to vest, notwithstanding the general rule that *nemo est heres viventis*. But these cases have been either where the limitation to the heir special has been qualified by the words "now living," or some other circumstances have appeared in the will, to manifest the testator's intention that the estate should vest.

The word "heir" is used in two senses: in a technical, legal sense, where it denotes the person upon whom the law casts an inheritance, whoever that person may be; and it is used in a popular sense, to indicate the person who is the apparent or presumptive heir during the life of the ancestor. In a legal sense, no one can be heir of a person living, for that would be a contradiction in terms; but in a popular sense, the heir of a person living is generally a description sufficiently certain. A devise to "heirs," in the popular sense, is a conveyance by purchase. Thus where A. devised lands to J. S. and his heirs, during the life only of B., upon trust to permit and suffer B. during his life to receive the profits, he committing no waste, and after the decease of B. then to the heirs male of the body of B. now living, and to such other heirs male or female as he thereafter should happen to have of his body; B. had issue, C., a son, then living. The Court of King's Bench adjudged that B. took a trust estate for life, and that

the remainder in tail vested in C. immediately; for that the words "now living" were a sufficient designation of the person to allow the remainder to vest.

VI. 2. Whether in a limitation to the "heirs male," when these words operate as words of purchase, the special heir must also be heir general.

Take a limitation to A. and the heirs male of his body. A. dies, leaving two sons; the eldest dies in the lifetime of his brother, leaving issue a daughter; it is plain that A.'s second son will take *per formam doni.* But A.'s granddaughter is A.'s general heir. The point suggested for consideration is, whether in such a devise, where the words "heirs male" operate as words of purchase, the second son could take, or whether he must unite in himself, to the quality of heir special, the quality of heir general also. Lord Coke and the older authorities maintained the necessity of the union; but in subsequent decisions, the contrary doctrine is held.

SECTION THE SEVENTH.

VII. 1. The uncertainty of the remainder ever taking effect in possession does not make the remainder contingent.

As if a lease be made to A. for life, remainder to B. for life, or in tail; here, although B. may die, or die without issue in the lifetime of A., the remainder is not contingent, but vested. An estate is said to be vested when there is an immediate fixed right of present or future enjoyment. An estate is said to be contingent when the right itself to the future enjoyment is in sus-

pense. In this case, then, the right to the future enjoyment being immediate and fixed, the remainder is not contingent, but vested. It is entirely immaterial, so far as the nature of the remainder is concerned, whether the future enjoyment ever accrues or not.

VII. 2. Application of this doctrine to the usual limitation to trustees to preserve contingent remainders.

The usual limitation to trustees to preserve contingent remainders is not a contingent but a vested remainder. A limitation to A. for life, remainder to B. for the life of A., is a limitation of this character. A.'s estate may expire either with his life or by his surrender or forfeiture. Now, the right of the grantor to resume the estate in the event of forfeiture is a vested right in the nature of a reversion, and incident to the character of an estate for life. This vested right the grantor may convey to others, and it remains a vested right in them. On this ground, the limitation to trustees to support contingent remainders is not contingent, but vested.

SECTION THE EIGHTH.

ON THE EFFECT OF CONTINGENT REMAINDERS INTERVENING BETWEEN THE PARTICULAR ESTATE AND THE REMAINDERS OVER, IN MAKING THEM CONTINGENT OR NOT.

VIII. 1. Where such contingent remainders are not in fee simple.

Whenever a contingent remainder is limited, which is followed by another limitation over, if the intervening

contingent limitation be not in fee, the subsequent limitation may be vested, if made to a person *in esse*. As upon a feoffment to the use of feoffees during the life of A., and after his death to the use of his first and other sons successively in tail, with several remainders over; and A. having no sons at the time of the feoffment, it was resolved that all the uses limited to persons not *in esse* were contingent, but the uses to persons *in esse* were vested immediately; and that the contingent uses when they should come *in esse* would vest by interposition, if the estate for life, which ought to support them, was not disturbed.

VIII. 2. Where such contingent remainders are in fee simple.

Mr. Fearne remarks: "But where there is a contingent limitation in fee absolute, no estate limited afterwards can be vested. As a devise to A. for life, without impeachment of waste, and if he have issue male, then to such issue male and his heirs forever; and if he die without issue male, then to B. and his heirs forever. In that case the court held that the remainder to B. and his heirs was not vested, because the precedent limitation to the issue of A. was resolved to be a contingent fee; and they took the distinction I have stated, that where the mean estates are for life, or in tail, the last remainder may, if it be to a person *in esse* vest; but that no remainder after a limitation in fee can be vested. It seems, however, that a contingent determinable fee, devised in trust for some especial purposes only, will not prevent a subsequent limitation to one *in esse* from being vested."

SECTION THE NINTH.

ON THE EFFECT OF A POWER OF APPOINTMENT ON ESTATES LIMITED TO TAKE EFFECT IN DEFAULT OF APPOINTMENT.

Sometimes estates are subjected to a power of appointment in the first taker, with remainders over in default of such appointment; as an estate to A. for life, subject to such appointment, in fee or in tail, as A. shall make by will, and in default of such appointment, remainder to J. S. in fee, or in tail. Here the remainder to J. S. is not in contingency, but vested presently, subject to being divested by the appointment of A. We have seen that when a contingent limitation of the fee intervenes between the particular estate and the subsequent remainders, the subsequent remainders are not vested presently; but in that case there is an actual limitation of the fee at the execution of the deed; here, there is no limitation at all until the appointment gives it existence. If no appointment is ever made, no such limitation is ever made; no such limitation, then, being in existence, there is nothing to operate so as to suspend the effect of limitations actually made. Whether, then, the power of appointment extends to creating a fee, or is confined to limiting a less estate, the remainders limited upon default of such appointment are vested.

It is to be further observed, that where a remainder is limited so as to depend upon a contingency, this contingency may be considered as confined to such remainder, without extending to or affecting the subsequent limitations. Thus, in the case of Napper *v.* Sanders, before cited, it was adjudged that such subsequent limitations vested presently.

SECTION THE TENTH.

ON THOSE CASES WHERE A REMAINDER IS LIMITED SO AS TO DEPEND UPON A CONTINGENCY AFFECTING THE PRECEDING ESTATE, BUT WHICH MAY NOT AFFECT THE ULTERIOR LIMITATIONS.

These are reduced to three classes, which are considered in their order.

X. 1. Limitations after a preceding estate, which estate is made to depend on a contingency which never takes effect.

The case of Napper *v.* Sanders is a leading authority. In that case, and in subsequent decisions, we find that the contingency affected only that estate to which it was first annexed, and did not extend to the ulterior limitations.

X. 2. Limitations over upon a conditional contingent determination of a preceding estate, where such preceding estate never takes effect.

As an example under this class is a devise to trustees for eleven years, remainder to first and other sons of B. successively in tail male, provided they should take the testator's surname; and in case they or their heirs should refuse to take the testator's surname, or die without issue, remainder to the first son of C., remainder over; B. died without having had any son; C. had a son at the time of the devise. The court did not agree as to the validity of the devise to the first son of

B., it being after a term of years, without any preceding freehold to support it; but resolved that the subsequent limitation to the first son of C., who was then *in esse*, and capable, took effect; and that the preceding limitation to the first son of B., or the condition thereto annexed, did not operate as a precedent condition which must happen to give effect to the subsequent limitation to the son of C., but was only a precedent estate attended with such limitation.

X. 3. Limitations over upon the determination of a preceding estate by a contingency which, though such precedent estate takes effect, never happens.

As to this third class of cases, it is to be observed that although, where a remainder is devised to take effect on a condition annexed to the preceding estate, and that preceding estate fails, it appears that the remainders shall nevertheless take place; yet where such preceding particular estate takes place, and the condition is not performed, the remainder, it has been held, will not take effect at the expiration of such preceding estate, unless in those cases where the apparent general intention of the testator calls for it.

X. 4. Where a remainder is limited in words, which seem to import a contingency, though in fact they mean no more than would have been implied without them.

As where an estate was given to A. for life, and afterwards to his first, second, third, and fourth sons in tail, and if his fourth son should die without issue, then to B. These mere words of condition do not import a condition at all. They merely refer to the time when the

remainder shall vest in possession. It is a vested remainder in B.

X. 5. Where the contingency upon which the estate is limited has been considered as a condition subsequent, not precedent.

In the case of Stocker *v.* Edwards, there was a surrender of copyhold lands to the use of the surrenderor for life, and after to the use of his youngest son and the heirs of his body, if he attained the age of eighteen, and if he died before eighteen without issue male, then to the right heirs of A. It was held to be a condition subsequent with respect to the youngest son, and therefore the remainder vested immediately, subject to be defeated by the condition of his dying without issue male before he attained the age of eighteen. But this class of cases appears rather to belong to shifting uses or trusts, or executory devises.

CHAPTER THE SECOND.

OF THE NATURE OF THE CONTINGENCY UPON WHICH A REMAINDER MAY BE LIMITED.

The limitation intended as a contingent remainder may fail to take effect, if the dubious or uncertain event upon which it is made to depend be—

1. An illegal act.
2. If the possibility of its happening be too remote.
3. If the event defeats the preceeding estate.

1. The event being an illegal act.

The law will never adjudge a grant good, by reason of a possibility or expectation of a thing which is against law. For in the contemplation of law such an event never takes place—*nunquam venit in actum.* Upon this principle a limitation to a bastard not *in esse* is held to be void. The law does not expect that such generation should be.

2. The remote possibility of the contingent event.

Possibilities are of two kinds, *potentia propinqua* and *potentia remotissima.* A *potentia propinqua* is a common possibility, as death, or death without issue, or coverture and the like. A remote possibility has been defined to be a possibility upon a possibility. In a limitation to A. for life, remainder to the heirs of J. S. there is a common possibility that J. S. may die during the continuance of the particular estate, hence the remainder limited is good. There is but one uncertain event, and as this may by common possibility happen, the possibility is not too remote. But if a remainder

be limited to G., the son of D., and D. have no son, the possibility is too remote and the remainder is bad; for here are two possibilities, one on the other; first, that D. shall have a son, and second, that this son shall be named G. It is difficult to draw the line of distinction accurately between these two kinds of possibilities. Thus a remainder limited to the son of A. who shall first attain the age of twenty-one years is a good remainder, although two possibilities must precede; first, that A. shall have a son, and second, that this son shall attain the age of twenty-one years. The general rule seems to be, that where there must be a concurrence of two several contingencies, not independent and collateral, but the one requiring the previous existence of the other, and yet not necessarily arising out of it, that then the contingency is too remote.

3. The condition enuring to defeat the preceding estate.

The third objection may be divided into two branches:

(*A*) Where the condition upon which the subsequent limitation is intended to arise or take effect is repugnant to any rule of law, or contrariant in itself, or inconsistent with the quality or nature of the preceding estate.

(*B*) Where the condition operates to defeat or abridge the preceding estate.

(*A*) Where the condition upon which the subsequent limitation is intended to arise or take effect is repugnant to any rule of law, or contrariant in itself, or inconsistent with the quality or nature of the preceding estate.

(*a*) Repugnancy to law. A proviso to make the estate of tenant in tail cease during his life is void; for

although the whole estate may be determined by a condition, yet part of it only, viz.: during the life of the tenant in tail, shall not. In this case the proviso is ineffectual on account of its repugnancy to the rule of law.

(*b*) Where the condition is contrariant in itself.

An example of this description would be a proviso for determining an estate tail, as if tenant in tail were dead. For the death of tenant in tail does not determine the estate tail, but his death without issue. Such a proviso is equivalent to saying that the estate tail shall determine in the same manner as it would determine upon an event which does not determine it at all, and hence is absurd.

(*c*) Where the condition is inconsistent with the quality and nature of the preceding estate.

There are certain qualities and incidents so inherently and inseparably annexed to certain estates that no proviso, limitation or condition whatever can divest them. These qualities or incidents are to the estates to which they are annexed what attributes or qualities are to substance, in a metaphysical sense. The estate itself exists in and through these qualities, and to take these qualities away leaves—0. Thus the power to suffer a common recovery is inseparably incident to an estate tail, and this power cannot be restrained by condition, limitation, custom, recognizance, statute or covenant. Many attempts have been made to restrain tenants in tail from exercising this power, but all to no purpose.

(*B*) Where the condition operates to defeat or abridge the particular estate.

1. (*a*) We have already seen that where a condition enures to defeat an estate, a remainder, in the proper sense of that term, cannot be limited thereon; for every remainder must be so limited as to await the regular and natural expiration of the preceding estate, and cannot be limited upon an event which operates to destroy the estate before the period fixed for its regular expiration. And this is because, as already stated, none but the grantor or his heirs could, at common law, take advantage of the condition broken. The condition had to be taken advantage of by entry, and this entry of the grantor or his heirs divested the seisin of the preceding estate, and would, as a consequence, have destroyed or negatived the seisin of the subsequent estates, which seisin was incorporated inseparably in the seisin made in the preceding estate. It follows, therefore, that a remainder, properly so called, cannot be limited to take effect upon a condition which is to defeat the preceding estate. Thus if a lease be made to two, the remainder over in fee after the death of the first of them, this remainder is void; because the survivor must have the lands during his life by the nature of the first estate. The remainder over after the death of the first of them cannot take place, because it defeats the first estate in joint tenancy. And so of any other condition which defeats an estate.

We are to observe, however,

(*b*) That if lands be leased to one for life, &c., and if such a thing happen, then to remain to B., &c., this shall not be understood as intended to vest in possession, immediately upon the happening of the condition, and in abridgment of the preceding estate; because under that construction the remainder would be void, for the reasons

given in the preceding paragraph; but it shall be construed to vest in interest upon the happening of the condition, and to remain as a remainder ought to do; that is, so as to await the determination of the preceding estate, before it comes into possession.

As if a gift in tail be made to one, upon condition that if he do such act, then the land shall remain to his right heirs; the word "then" is not to be so understood as to avoid the estate tail and execute the fee simple in possession immediately on performance of the act; but must be taken in this manner, viz., that upon performance of the act, the remainder in fee shall vest in him, not to be executed in possession till the expiration of the estate tail. It is to be remarked, in passing, that estates tail are prevented from merger under the operation of the statute *de donis*.

2. Some contingent limitations are of such a character that they do not enure to defeat or abridge the preceding estate, but enure to enlarge or augment it in the grantee himself.

Thus in a limitation to two for their lives, remainder to the survivor in fee, the remainder to the survivor does not depend upon a condition which defeats the preceding estate in the survivor, but merely embraces the estate of the survivor in a wider estate, and the two estates flow into each other and blend under the technical term of merger. These are strictly remainders at common law.

3. There is a distinction to be taken between the cases, where (*a*) a subsequent estate at common law is limited to take effect upon a condition which is to defeat the preceding estate; and other cases where (*b*) the preceding estate is limited, subject to a condition,

but the remainder is limited without any relation to or dependence at all upon that condition. In the former case we have seen that the remainder is void; in the latter case the remainder is good. Here the grantor has absolutely, without condition, granted away a remainder, and it is unreasonable that the grantor should defeat it. Littleton says that if a man lease for life upon condition of re-entry for default of payment of rent, and the lessor afterwards grants his reversion, the lessor or his heirs cannot enter, because he has aliened the reversion. Thus if a man lease for life to A. upon condition, remainder over, the condition itself is destroyed, and the lessor hath departed with the reversion at the time the limitation was made as fully and completely as if he had granted it afterwards by another conveyance.

4. It is well settled, in the case of a devise, that where a condition is annexed to a preceding estate upon the non-performance of which the estate is devised over to another, that upon condition broken, the preceding estate shall *ipso facto* expire and determine without entry on the part of the heir; and the person claiming under the limitation over shall immediately take the estate in possession. Limitations of this sort are properly called Conditional Limitations. They are void at common law, but good by way of a devise. These (conditional) limitations are also good by way of a use; for a use may be limited to cease as to one person, and to vest in another. These uses are called shifting or secondary uses, and are allowed because they were good before the Statute 27 Henry VIII., when uses were fiduciary and totally distinct from the legal estate, and where the *cestui que use* had a remedy by *subpœna* where none existed under similar circumstances at common law.

5. Whether shifting or secondary uses are good in surrender of copyhold estates is a disputed question. Mr. Fearne inclines to the affirmative. Watkins, in his treatise on Copyholds, concludes in the negative.

6. With regard to those estates where the condition enures to enlarge or augment the preceding estate in the grantee himself, it is to be observed that such increase of an estate by such condition must have four incidents :

(*a*) There must be some vested estate for the increase to take effect upon.

(*b*) Such estate must continue in the lessee or grantee until the increase happens.

(*c*) The increase must vest immediately upon the performance of the condition.

(*d*) The particular estate and the increase ought to take effect by one and the same instrument or deed.

CHAPTER THE THIRD.

OF THE ESTATE NECESSARY TO SUPPORT A CONTINGENT REMAINDER.

I. IT is a general rule that whenever an estate in contingent remainder amounts to a freehold, some vested estate of freehold must precede it.

This rule was originally founded on feudal principles, and was intended to avoid the inconveniences which might arise by admitting an interval where there should be no tenant of the freehold to do the services to the lord or answer the stranger's precipes, as well as to preserve an uninterrupted connection between the particular estate and the remainder, which, in the consideration of the law, are but several parts of one whole estate. It is this necessity—expressed by the rule that the freehold shall never be in abeyance—which requires the freehold to pass out of the grantor at the time the remainder is created, and it must precede the contingent remainder; for, if it passes at all, it must pass either in the particular estate or in some remainder limited after it. In a contingent remainder it cannot pass, because such remainder at the time of its creation passes to or vests in nobody; and if it passes only in some vested remainder limited after the contingent remainder, then can such contingent estate never arise at all; for that freehold then becomes vested in possession which the contingent estate was limited to precede; and, of course, there is no room left for the introduction of the contingent freehold. It follows, therefore, that

some preceding vested estate of freehold must be limited to give existence to such a contingent remainder.

Thus, in a devise to B. for fifty years, if he should so long live, remainder to the heirs of the body of B., remainder to C., the limitation to the heirs of the body of B. would be void as a remainder for want of a freehold to support it.

But, in an estate limited to A. for ninety-nine years, if he should so long live, remainder to trustees during the life of A., remainder to the wife for her jointure, remainder to the heirs of the body of A., although the particular estate was but for years, yet the contingent remainder to the heirs of the body of A. was good, because preceded by a vested freehold remainder to the trustees.

II. The rule respecting the estate requisite to support a contingent remainder holds equally in the limitation of uses as in estates executed in possession at common law.

Before the Statute of Uses, if a feoffment had been made to A. for years, remainder (of the use) in contingency, the contingent use would have been good, for the feoffees remained tenants of the legal freehold. But since that statute, the feoffees have no estate whatever, but are merely the instruments through which the seisin flashes instantaneously into the *cestui que use*.

Therefore, where there was a lease and release by A. to trustees and their heirs to the use of A. for ninety-nine years, remainder to the use of trustees for twenty-five years, remainder to the heirs male of the body of A., the court held the limitation to the heirs male of the body of A. to be void, because there was no preceding estate of freehold to support it.

III. A contingent remainder for years does not appear to require a preceding estate of freehold to support it.

For the remainder not being freehold, it does not appear necessary that a freehold should pass out of the grantor when it is created.

IV. It is not necessary for the support of a contingent remainder that the preceding estate of freehold continue in the actual seisin of the rightful tenant; it is sufficient if a right of entry exist at the time the remainder should vest.

For the disseisee has still the right of possession, and the law regards him as the rightful tenant. But if the disseisor die in possession, then the law casts the descent upon his heir, and the disseisee's right of entry is divested, and he is driven to his right of action. Where the right of entry is lost by a descent cast, or by any other cause, the remainder cannot vest.

V. This right of entry must be a present right, a future one will not do; it must also precede the contingency and be actually existing when that happens; for if it only commences at the same instant with it, the remainder it seems will not vest.

VI. Where the estates are limited by way of use, and are afterwards divested and turned to a right, it has been held requisite to the execution of the subsequent contingent uses, that either the *cestui que use* under some preceding vested use, or that the feoffees or their heirs should enter, in order to revest the estates.

It is to be observed:

1st. That a contingent use is destroyed by the abso-

lute termination of the preceding estate, before the contingent use can vest.

2d. That a contingent use is destroyed if the preceding estate is turned to a right of action.

Both these characteristics are common to estates limited by way of use and to estates at common law.

But we have seen that in estates at common law, if the right of entry was intact in the preceding estate, that there was still sufficient seisin to allow the subsequent contingent estate to vest. The question for consideration now is, if such a mere right of entry in the feoffees or *cestui que use* is a sufficient seisin to preserve the preceding estate; or if entry must be actually made in order to uphold the preceding estate and save the subsequent contingent use?

At common law, the use and the legal estate were entirely separate and distinct. The law took no notice whatever of the use. The estate in the feoffees to uses was in every respect the same as if no such use had been declared, so far as courts of law were concerned. It was only by subpœna in Chancery that the *cestui que use* had a remedy for an injury done him by the feoffees to uses.

The Statute 27 Henry VIII. changed all this. Before this statute, in a limitation to A. and his heirs to the use of B. and his heirs, the legal estate was in A., the equitable estate in B. All the burdens incident to a legal estate rested upon A., all the profits and enjoyment were reserved to B. After this statute, the estate to A. was annihilated. The legal estate was vested in B. as perfectly and completely by this conveyance by the way of or through the medium of a use, as if B. had been enfeoffed with livery of seisin at common law.

Thus the statute was said to execute the use; but it did not abolish conveyances through the medium of uses.

In these conveyances by way of use, four things must concur to execute the use:

1. There must be a person seised to the use. 2. There must be a *cestui que use in esse*. 3. A use in *esse, i. e.*, in possession, reversion or remainder. 4. An estate or seisin, out of which the use is to arise.

In an estate to A. and his heirs to the use of B. and his heirs, there is no difficulty in the execution of the use. The whole fee passes instantaneously through A., and takes effect in B. Nor is there any difficulty when the estate is to A. for life, remainder to the use of D. in fee. The whole seisin is divested out of the feoffees, and takes effect in the *cestuis que use*, under the statute.

But suppose a limitation to the use of A. for life, contingent remainder to A.'s first and other sons in tail, remainder to C. in fee?

Now, where was any seisin in the feoffees to be transferred to the first and other sons of A. when they should come into being?

In Chudleigh's case the judges reasoned as follows:

It was a self-evident proposition that the whole fee conveyed to the feoffees did either (1) all pass out of them in the execution of the uses; or (2) that it did not all pass.

In the first case, if all passed, then there was no seisin left in the feoffees upon which the contingent uses could be executed when they arose.

If it did not all pass, then the vested uses to A. for life, and to C. in fee, were not executed; which was contrary to the statute.

The judges avoided the dilemma by a fiction. They

said that, although there was no actual seisin in the feoffees, there remained in them a possibility of seisin, or, as it is called, a *scintilla juris*, to serve the contingent uses when they should arise. This brings us to the consideration of the point arising in this paragraph, viz.: When the preceding estate has been turned to a right of entry, is it necessary for the trustees or the *cestui que use* to actually make the entry, in order to preserve the possibility of seisin, so that a seisin may exist in the feoffees when the contingent uses arise upon which these uses may be executed?

Mr. Fearne argues that an actual entry is not necessary.

VII. The estate supporting and the estate supported must both be created by one and the same instrument or conveyance.

VIII. Where the estate is devised to and vested in trustees in trust, there is no necessity for any preceding particular estate of freehold to support contingent limitations.

And this for the reason that the legal estate in the general trustees is sufficient.

IX. If a rent were granted to A. for the life of another, with a remainder over, though the grantee die during the life of *cestui que vie*, it has been held that the remainder over was supported.

The retention of the rent by the terre-tenant has been held a sufficient occupancy to keep up the estate necessary to the support of the remainder over.

CHAPTER THE FOURTH.

OF THE TIME WHEN A CONTINGENT REMAINDER SHOULD VEST.

I. THE preceding estate of freehold must subsist and endure until the time when the contingent remainder vests.

There are some few instances of vested remainders taking effect though the preceding estate be defeated. As where lessor disseiseth A., his lessee for life, and makes a lease to B. for the life of A., the remainder to C. in fee; here, though A. enter and defeat the estate for life, the remainder to C. is good, for having been once vested by a good title, it would be unreasonable that the lessor should have it against his own livery.

II. Yet the remainder may be so limited as to vest at the very instant at which the particular estate determines.

As if a remainder be limited to B. for the life of A., and at the death of A. to the heirs of A., the remainder is good, for a remainder must vest either during the continuation of the estate or *eo instanti* of its determination. At the instant of A.'s death the remainder vests in his heirs.

III. Wherever a preceding estate is in several persons in common or in severalty, a remainder limited upon it in contingency may fail as to one part, and take effect as to another.

The case of Lane and Pannel is to the present point, in effect as follows: Feme covert and stranger being joint tenants for life of copyhold lands, with remainder to the heirs of the body of the baron and feme, the stranger surrendered his moiety to the baron and feme, and afterwards the baron surrendered the whole to B. in fee. The feme died leaving issue, and afterwards the baron died; the question was, whether the remainder to the heirs of the body of the baron and feme vested in the issue; and it was adjudged that when the stranger conveyed his moiety to the baron, the jointure between the stranger and the feme covert was severed; and when the baron afterwards conveyed the whole to B., B. took an estate in one moiety for the life of the feme (defeasible by her on the death of her husband), and in the other moiety for the life of the stranger; therefore, upon the death of the feme, the estate in the first moiety was determined; at which time the remainder as to that moiety ought to have vested, which it could not do, because the person to take it was to be heir of the bodies of both baron and feme; but that was impossible during the life of the baron (for *nemo est heres viventis*); and therefore, as the remainder could not vest at the determination of the preceding estate, it should never vest at all as to that moiety. In this case it appears that the remainder failed as to one moiety.

A contingent remainder may also take effect in some and not in all of the persons to whom it is limited; as if after an estate for life to A., a remainder be limited to the heirs of B. and C. Now, if B. dies during A.'s life-time, and C. survives A., the remainder will take effect in the heirs of B., but never in the heirs of C., because as to them, the particular estate to A. determined before

the remainder could vest, for there could be no heirs of C. during C.'s lifetime.

IV. Where a contingent remainder is limited to the use of several, who do not all become capable at the same time, notwithstanding it vests in the person first becoming capable, yet it shall divest as to the proportions of the persons afterwards becoming capable, if this capability accrue before the determination of the particular estate.

Thus, where a conveyance was to the use of A., the husband, for life, remainder to the use of B., the wife, for life, remainder to the use of all the issues female of their two bodies, and the heirs of the bodies of such issues female, A. and B. had issue a daughter; and it was resolved that the remainder in tail to the issues female was not so attached in that daughter as not to be divested for a moiety on the birth of another daughter.

It may be observed here that if there be no particular estate *in esse*, nor any present right of entry when the contingency happens, although the particular estate be afterwards replaced and restored, yet will the remainder never arise.

CHAPTER THE FIFTH.

HOW CONTINGENT REMAINDERS ARE DESTROYED OR PREVENTED TAKING EFFECT.

I. It has been already shown that a legal remainder must vest either during the existence of the particular estate (*in esse*, or in a right of entry), or at the very instant of its determination, otherwise it will never take effect at all; consequently, contingent remainders are destroyed by such determination of the preceding estate before the contingency happens as leaves no right of entry.

Those cases where the particular estate is determined by the feoffment, forfeiture, surrender, or other act of the particular tenant, are first discussed; then those are considered where the particular estate is merged by the descent of the inheritance on the particular tenant.

II. Where the determination of the preceding estate arises by the feoffment, forfeiture, surrender, or other act of the particular tenant.

In the case of a gift in tail to A. C., the remainder to the right heirs of J. S., the donee made a feoffment in fee, and afterwards J. S. died. It was held that his heir should not have the land, because the particular estate was determined by the feoffment before the remainder could vest.

So where there was a tenant for life, with remainder to his first and other sons successively in tail, remainder

to B. in tail, tenant for life before the birth of any son, surrendered to B.; a son was afterwards born, and the court held that the surrender, if good, would have barred the remainder.

III. The surrender of a copyhold will not destroy a contingent remainder.

The reason for this is that such lands are holden in base tenure, and the freehold and inheritance are both in the lord, and the inconvenience does not arise as would arise if the freehold in free tenure were in abeyance.

IV. But if copyhold land be surrendered to the use of a person for life, remainder in contingency, and the tenant for life die before the contingency happens, the remainder fails.

Because this incident is independent of and collateral to the nature of the tenure.

V. *Cestui que trust* for life cannot, by feoffment or other conveyance, destroy a contingent remainder.

For though when the trust of an estate is limited to a man and the heirs of his body, with remainder over, if such tenant in tail of a trust suffer a recovery, the remainders will be barred; yet where tenant for life of a trust conveys in fee by feoffment or any other conveyance, it is no forfeiture of his estate, neither will it destroy a contingent remainder depending on it; because whatever conveyance he makes, as he has not the legal

estate in him, it passes only what he can lawfully grant (*i. e.*, his trust estate for life), and a right of entry resides in the trustees in whom the legal estate is vested. But a recovery suffered by a tenant in tail of a trust will bar a remainder, because tenant in tail may call in the legal estate when he pleases, and have it conveyed to the trust. But the Court of Chancery will never execute the estate in law to tenant for life of a trust, to enable him to destroy the contingent remainder.

VI. Bargain and sale or lease and release by tenant for life will not destroy a contingent remainder limited upon his estate.

For by these two kinds of conveyances, a man only passes what he lawfully may pass, and any further assurance by such conveyances is void.

VII. It is also to be observed that there are some acts by tenant for life which, though they amount to a forfeiture of his estate, so as to give a vested remainder-man title to enter if he pleaseth; yet as they discontinue, divest, or disturb no remainder or subsequent estate, nor make any alteration in or merger of the particular estate, do not therefore, as it seems, destroy or affect a contingent remainder, unless advantage is taken of the forfeiture by some subsequent vested remainder-man.

Thus, if tenant for life accepts a fine *come ceo*, &c., from a stranger, it is undoubtedly a forfeiture, so as to entitle a remainder-man to enter, for he hereby affirms on record the reversion to be in a stranger; and yet it

does not displace or divest the remainder or reversion. Therefore, where A. was tenant for life, remainder to his first son in tail, &c., remainder to B. for life, remainder to his first son in tail, &c., A., having a son, accepted a fine from B., and then made a feoffment in fee; then B. had issue a son; and it was resolved that the acceptance of the fine displaced nothing; and though A.'s feoffment displaced all the estates, yet the right of entry in the son of A. supported the contingent remainders.

But a contingent remainder may be destroyed by an act which, though it does not discontinue or divest any remainder or subsequent vested estate, yet extinguishes the particular estate on which the contingent remainder depends. Thus, if A. be tenant for life, remainder to his first and other sons in tail, remainder to B. in fee; and A. and B. join in a fine to a third person, this is no discontinuance or divesting of any estate, because each gives only his own. Yet it is held that the intermediate contingent remainders are destroyed by the union of the particular estate with the remainder in the grantee, after which no distinct particular estate exists to support the contingent remainder.

VIII. Whether a contingent remainder is created by a conveyance at common law, or limited by way of use, the same rule holds in regard to its capacity of being destroyed.

So if one make a feoffment in fee, or covenant to stand seised to the use of himself for life, and afterwards to the use of his first son in tail male, and before the birth of any son make a feoffment in fee, such feoffment will destroy the contingent remainder to the son.

IX. The legal subjection of contingent remainders to the power of the preceding tenant of the freehold has introduced the estate and trust usually inserted in deeds and wills for preserving contingent remainders.

This is a good remainder vested in the trustees, under which they will have such a right of entry, in case of any forfeiture or tortious alienation by the tenant for life, as will support the contingent remainders expectant on his decease. Such precaution is constantly used at this day in settlements and conveyances on marriage, or by will or otherwise, where there are any contingent remainders that call for such a protection.

X. If trustees for preserving contingent remainders join in a conveyance to destroy them, a court of equity will consider it a breach of trust.

In this case the court will decree that the trustees purchase other lands with their own money equal in value to the lands sold by them, and to hold them upon the same trusts and limitations that they held the other. But if the conveyance be with notice of the uses, whether with or without consideration, in that case the purchaser shall hold the lands subject to the former trusts.

XI. But if tenant for life with contingent remainders to his first and other sons destroy the contingent remainder at law, as he is no trustee, it is no breach of trust.

XII. A court of equity will sometimes, in the exercise of a discretionary power, direct the trustees for preserving contingent remainders to join with the tenant for life, or his first son, in barring subsequent contingent limitations.

But this only happens under peculiar circumstances; either of pressure to discharge incumbrances prior to the settlement, or in favour of creditors where the settlement was voluntary; or for the advantage of the persons who were the first objects of the settlement, as to enable the first son, &c., to make a settlement upon an advantageous marriage.

XIII. Although equity does not interpose in case of the destruction of contingent remainders by tenant for life, where there is no trust in the case to bring it within the cognizance of a court of equity, yet it views such destruction of contingent remainders in the light of a wrong or tort, which it is anxious to prevent.

Hence a court of equity seizes every occasion and makes every possible stretch for extending its protection against such destruction. Thus a trust declared in a will to support contingent remainders, though annexed to an improper, misplaced estate, has been rectified and transposed to effectuate the end. And in cases of articles, settlements, &c., for good and valuable consideration, the court has frequently gone as great or greater lengths in transposing clauses or supplying words, &c., to effectuate the intent.

XIV. The position has been laid down that any alteration in the nature of the preceding estate, before a remainder vests, will destroy that remainder.

As if lands be given to A. in tail, and if J. S. come to Westminster Hall such a day, remainder to J. S. in fee; (it has been said) that if the lands descend to two

co-parceners who make partition, the fee shall not accrue to J. S., though he should come to Westminster Hall on the day. Mr. Fearne is of the opinion that the alteration in a particular estate which will destroy a contingent remainder must amount to an alteration in its quantity and not merely in its quality.

XV. Where the particular estate is by the act of the parties merged in the reversion, the contingent remainder is destroyed, though there be no divesting of any estate.

As if there be tenant for life, remainder in tail in contingency, remainder in tail *in esse;* and the tenant for life, and he in remainder in tail *in esse*, levy a fine, this is no discontinuance, no divesting of any estate, because each gives such estate as he has; and yet the mean contingent remainder is destroyed.

XVI. But the books apparently differ with respect to the destruction of the contingent remainder, in cases where the inheritance becomes united to the particular estate by descent.

Thus one devised lands to T., his eldest son, for life, and if T. should die without issue living at his death, then to L., another of the testator's sons in fee; but if T. should have issue living at his death, then to the right heirs of T. for ever; the testator died, and it was resolved that T. was tenant for life with the remainder of the fee in contingency; and that the descent of the fee upon him, as heir at the death of the father, did not destroy the contingent remainder.

But in another case, A., the father, being tenant for life, remainder to his son B, for life, remainder to the first son of B., remainder to the heirs of the body of A.; A. died before any son was born to B.; the court held the contingent remainder to the first son of B. was destroyed by the descent of the estate tail on B.

This apparent diversity in the decisions may be reconciled by distinguishing between—

1. Those cases where the descent of the inheritance is immediate from the person by whose will the particular estate and contingent remainders were limited; as in the first case put, where the inheritance does not merge the contingent remainder; and,

2. Those cases where the particular estates and contingent remainders were not created by the will of the ancestor from whom the inheritance immediately descends upon the particular estate; as in the second case put, where the inheritance does merge the contingent remainders.

XVII. But whether, in case of a limitation to one for life, remainder to his first and other sons, &c., remainder to the heirs, &c., of tenant for life, this last limitation is so executed in him as to entitle his wife to dower upon her husband's decease, *sans* issue, has been a question.

The better opinion seems to be that the wife is dowable.

XVIII. On the effect of a feoffment on condition by tenant for life in destroying contingent remainders.

If a tenant for life with contingent remainder over

makes a feoffment in fee on condition, and the contingency happens before the condition is broken, the remainder is destroyed, notwithstanding the tenant for life afterwards enter for the condition broken. But if the tenant for life enter for the condition broken, before the contingency happens, the remainder it seems may vest; but in that case, if the reversioner enters for the forfeiture (which accrues by reason of the feoffment) before the contingency happens, the contingent remainder is destroyed. For although it might be argued that the forfeiture itself divested the estate, and that the forfeiture is not purged by the re-entry, yet on the authority of Lord Coke, who tells us that if lessee for life make a feoffment on condition, and afterwards enter for breach of the condition, it will reduce the reversion to the lessor and the estate for life will be restored, though still subject to the entry of the lessor for the forfeiture; upon this authority it seems that in this case the remainder is not destroyed.

CHAPTER THE SIXTH.

OTHER PROPERTIES OF CONTINGENT REMAINDERS.

THIS chapter treats of other properties of contingent remainders, which could not be appropriately brought under any of the foregoing general heads.

I. Where a remainder of inheritance is limited in contingency by way of use, or by devise, the inheritance in the meantime, if not otherwise disposed of, remains in the grantor and in his heirs, or in the testator's heirs, until the contingency happens to take it out of them.

Thus, where A. made a feoffment to the use of such person and persons, and for such estate and estates as he should limit and appoint by his last will in writing, A. had the use in the meanwhile. When A. died, the use would have been in the heir until the contingency arose upon which the estates were to vest. The same is true in limitations made by way of use, to take effect in the grantor's lifetime; wherever a use is not disposed of, it remains in the grantor. Such uses are called resulting uses.

II. On the effect of a devise of lands to trustees and the survivor of them, and the heirs of the survivor in trust to sell.

The legal estate in the trustees is a joint estate for life, with a contingent remainder in fee to the survivor of them. Until the contingency happens, viz.: until the survivor comes into the seisin of the fee, the inherit-

ance descends upon the heir. When the contingency takes place, the estate in the heir is divested, and vests in the survivor. In this case, the fee not being in the trustees, but in the survivor of them, it has been thought necessary for the trustees to join in a fine to bar their contingent interest, so as to be enabled to make a good title to the purchaser. But it seems that a fine is not necessary, because the intent and purpose upon which the lands were given to the trustees, viz., to sell, necessarily reaches the whole fee. In addition to this, the purchaser in this case—without fine—would come in under the will, to the exclusion as well of the heir of the testator as of the heir of the surviving trustee.

III. When a contingent remainder of inheritance is created in a conveyance at common law, where does the inheritance reside before the contingency happens?

We have seen that in conveyances by way of use and by devise, the inheritance resulted to the grantor and his heirs, or to the heirs of the testator. But with respect to such conveyances at common law different opinions have been entertained.

Some have held that in a case of a lease for life, remainder to the right heirs of J. S. then living, no estate at all remains in the grantor, and that he cannot enter for the forfeiture, in case of a feoffment by the tenant for life; while others, though disinclined to admit that any estate remains in the grantor in such case, still allow him a right of entry for the forfeiture, upon a feoffment by the tenant for life; no less than on the determination of his estate by death before the contingency happens.

These opinions are founded on an assumption that the remainder must pass out of the donor at the time of the livery; and, consequently, that no estate shall remain in him after such livery. The remainder, they say, in this case, is in abeyance, *in nubibus*, or *in gremio legis*.

Upon these opinions, and the reasons assigned therefor, Mr. Fearne remarks as follows: "Now, it must be an object of no small curiosity to understand how a remainder can pass from the donor until there exists some donee to receive it of him; if it passes at all, the conclusion rather seems to be, that it passes to somebody; and whilst it does not pass to anybody, one might suppose it does not pass at all. And, however profound a solution of this difficulty may be discoverable by adepts in legal lore, under the expressions 'in abeyance,' '*in nubibus*,' or '*in gremio legis*,' I cannot but think it a more arduous undertaking to account for the operation of a feoffment or conveyance, in annihilating an estate of inheritance, or transferring it to the clouds, and afterwards regenerating or recalling it at the beck of some contingent event, than to reconcile to the principles, as well of common law as of common sense, a suspension of the complete or absolute operation of such feoffment or conveyance, in regard to the inheritance, till the intended channel for the reception of such inheritance comes into existence; in any case, at least, where a present estate of freehold passes in the meanwhile, as the immediate and initiate subject of the operation of such conveyance. The doctrine of estates to be enlarged upon condition may be referred to for such a principle, as no new thing in our law; and the several cases cited by Lord Coke against the opinion of the fee simple pass-

ing before the condition performed, in case of a feoffment to one for years, upon condition to have an estate of freehold or inheritance on payment of a certain sum, &c., show that there was no such universally allowed absurdity in the texture of our common law, as to prevent the inheritance continuing in the grantor, where there was no passage for its transition open at the time of the livery.

"In short, to bring this doctrine to the test of common reason, we may state it thus: A man makes a disposition of a remainder or future interest, which is to take no effect at all until a future event or contingency happens; it is admitted that no interest passes by such a disposition to anybody before the event referred to takes place. The question is, What becomes of the intermediate reversionary interest from the time of making such future disposition until it takes effect? It was in the grantor or testator at the time of making such disposition; it is confessedly not included in it. The natural conclusion seems to be that it remains where it was, viz.: in the grantor or the testator and his heirs, for want of being departed with to anybody else. When the future disposition takes effect, then the reversionary or future interest passes pursuant to the terms of it; but if such future disposition fails of effect, either by reason of the determination of the particular estate, failure of the contingency, or otherwise, what is there, then, to draw the estate, which was the intended subject of it, out of the grantor, or his heirs, or the heirs of the testator? Or, who can derive title to an estate, under a prospective disposition which confessedly never takes any effect at all?"

IV. A contingent remainder of inheritance is transmissible to the heirs of the person to whom it is limited.

The same law, it seems, holds with respect to future uses. But in some cases the being *in esse* of the devisee, &c., to whom the contingent interest is limited, at some particular time, may enter into and make a part of the contingency itself, upon which such interest is intended to take effect; as in case of a settlement of the wife's lands on herself for life, remainder to husband for life, if any issue of the marriage should so long live, remainder to all the children in fee; and if she died without issue, or such issue died under twenty-one, then as to one moiety to the husband in fee. The Court of King's Bench held that upon all the circumstances of the case, the contingency on which the husband's estate in fee was to arise was that of his surviving (viz., living at the death of) his wife, and that as he died first, the contingency never arose.

V. A contingent remainder may, before it vests, be passed by fine by way of estoppel, so as to bind the interest which shall afterwards accrue by the contingency.

A contingent remainder cannot be passed or transferred by a conveyance at law in any other mode than by way of estoppel by fine, or by a common recovery, wherein the person entitled to the contingent estate comes in as a vouchee. It could not be transferred by conveyance, properly so called, because it was no estate *in esse*. It could be transferred by fine or common

recovery, because the title itself under which it was derived was declared nugatory in a court of law. For though fines and common recoveries are mere fictions and serve only as forms of conveyance, yet is the fiction consistent and the effect of such conveyances is the same as if an original writ had been actually sued out and the agreement recognized, or the recovery actually adjudged in a court of law.

VI. Contingent remainders appear formerly to have been held not devisable by the person entitled thereto.

But modern decisions have established the power of testamentary disposition of contingent and executory estates and possibilities, accompanied with an interest; and of such as would be descendible to the heir, on the object of them dying before the contingency or event on which the vesting or acquisition of the estate depended. But the decisions do not appear to reach those cases where neither the contingent interest itself is transmissible from any person until the contingency decides him to be an object of the limitation, nor the person or persons, to or amongst whom the contingent or future interest is directed, is or are in any degree ascertainable, before the contingency happens; as in the case of a contingent or executory limitation to the right heirs of J. S. (then living), where the description of the person to take cannot be confined to or among any ascertainable person or persons, during the life of J. S.; nor can it therefore be said in whom such interest is; nor, consequently, that it is in any body, during that period; nor will it be transmissible or descendible from any one dying before it becomes vested.

VII. A fee cannot, at common law, be mounted upon a fee, yet two or more several contingent fees may be limited merely as substitutes or alternatives the one for the other, and not to interfere, but so that one only take effect, and every subsequent limitation be a disposition substituted in the room of the former, if the former should fail of effect.

Thus, at law, if lands were limited to one and his heirs, and if he die without heirs, then to another in fee, the last limitation is void. So where the fee was base and determinable, as if lands were given to one and his heirs so long as J. S. has issue, and after the death of J. S. without issue, to remain over to another in fee, this remainder over is likewise void.

Such limitations may be good in a will or by way of use upon a contingency that may happen within the limits of perpetuity allowed by law (a life or lives in being and twenty-one years and some months thereafter), though not then as remainders, but as executory devises, or springing or shifting executory use.

But though a fee cannot, in conveyances at common law, be mounted on a fee, yet two or more several contingent fees may be limited as substitutes or alternatives, the one for the other; as where a testator devised to A. for life, without impeachment of waste; and if he have issue male, then to such issue male and his heirs for ever; and if he die without issue male, then to B. and his heirs for ever; it was held that the first remainder was a contingent remainder in fee to the issue of A., and the remainder to B. was also a contingent fee, not contrary to or in any degree derogatory from the effect of the former, but by way of

substitution for it. And this sort of alternative limitation was termed a contingency with a double aspect. For if A. had issue male, the remainder was to vest in that issue in fee; but if A. had no issue male, then it was to vest in B. in fee; and these were limitations of which the one was not expectant upon and to take effect after the other, but were contemporary; to commence from the same period, not indeed together, but the one to take effect in lieu of the other, if that failed. Mr. Fearne closes the treatise on Contingent Remainders with remarking that, "There are some other cases which might, with propriety enough, have been inserted under the same title; particularly some of those wherein the question whether a limitation should operate as a contingent remainder, or as an executory devise or future use, has been agitated, and the construction of a contingent remainder has prevailed; but as most of them must have been also noticed under the head of Executory Devises, and that of Contingent Remainders has already swelled in the progress rather beyond the limits I at first expected, I think it most convenient to refer them to the ensuing Chapter of Executory Devises."

EXECUTORY DEVISES.

CHAPTER THE FIRST.

AN EXECUTORY DEVISE DEFINED, AND ITS SEVERAL KINDS DISTINGUISHED.

I. AN executory devise is, strictly, such a limitation of a future estate or interest in lands as the law admits in the case of a will, though contrary to the rules which govern limitations in conveyances at common law.

An executory devise has been defined to be a devise of a future interest in lands, not to take effect at the testator's death, but limited to arise and vest upon some future contingency. This definition is too broad. It includes executory devises, strictly so termed; but it includes more—it includes contingent remainders, which are not executory devises, although they take effect under a limitation in a devise. The definition is good to distinguish devises of all contingent interests from immediate devises, which immediate devises confer an estate vested either presently upon the death of the testator, or vested to take effect in possession at some future time. (Mr. Fearne also considers executory bequests of chattels, real and personal, under the head of executory devises, though strictly they would be excluded.)

Thus, where A. devised lands to B. in fee, to com-

mence and take effect six months after the testator's death, the limitation was good as an executory devise, though void at common law, because at common law no estate of freehold could be limited to commence *in futuro*.

So where a testator devised to B., his son, and to his heirs for ever, and if B. died without issue, living A., then to A. in fee, the limitation was good as an executory devise, though void at common law, because at common law none but the grantor or his heirs could take advantage of a condition broken.

And even though an antecedent devise in fee simple be not vested, but contingent, yet if the ulterior devise be limited so as to take effect in defeasance of the estate first devised, on an event subsequent to its becoming vested, it has been held to operate as an executory devise.

An executory devise is only an indulgence allowed to a last will and testament, and is in derogation of the common law. On these grounds, whenever a limitation in a devise can, consistently with the will of a testator, be construed to take effect at common law, it is never construed as an executory devise. Hence the unvarying rule that, whenever a future interest is so limited by devise as to fall within the rules laid down for the limitation of contingent remainders, such an interest is not an executory devise, but a contingent remainder.

II. If a particular estate of freehold be first devised, capable in its own nature of supporting a remainder, followed by a limitation, which is not immediately connected with, or does not immediately commence from, the expiration of the particular estate of freehold, the

latter limitation is incapable of taking effect as a remainder, but may operate as an executory devise, if confined to the requisite limits of time.

Thus, if lands be devised to one for life, and after his decease to B. in fee, the limitation to B. in fee is immediately connected with and immediately commences on the expiration of the estate limited to A. for life, and is therefore a remainder. But if the land be limited to A. for life, and after the decease of A., and one year after his decease, to B. in fee, the interval of the year prevents the limitation to B. from being immediately connected with and from immediately commencing at the expiration of A.'s life estate; it cannot, therefore, operate as a remainder, but operates as an executory devise.

III. Executory devises have generally been distributed into three kinds; two kinds include real estate, and the third kind, personal estate only.

A. The first kind is where the devisor departs with his whole fee simple, but on some contingency qualifies that disposition, and limits an estate on that contingency. As where a testator devised lands to his wife for life, remainder to C., his second son in fee, provided if D., his third son, should, within three months after his wife's death, pay 500*l.* to C., his executors, &c., then he devised the lands to D. and his heirs. This was an executory devise to D.

B. The second kind is where the devisor gives a future estate to arise upon a contingency, but does not part with the fee at present. As a devise to the first

son or heir of J. S., when he shall have one; or a devise to the daughter of B. who shall marry such a one within fifteen years.

In addition to the cases strictly falling under the second class, those are to be included where

(*a*) The future estate is not contingent, but limited in an event certain.

(*b*) Though the testator departs with an immediate estate of freehold, yet the ulterior limitation is not so connected with it as to be capable of effect as a remainder.

The case of a devise to one, to take effect six months after the testator's decease, is an instance under the extended description (*a*). The case of a limitation to one for life, and from and after the expiration of one day next ensuing his decease, then to another, is an instance under the extended description (*b*).

C. The third kind of executory devises, comprising all that relates to chattels, is where a term for years, or any personal estate, is bequeathed to one for life or otherwise; and after the decease of the legatee for life, or some other contingency or period, is given over to somebody else.

Such ulterior limitation of chattels, real or personal, was void at common law, and the whole property vested in the person to whom it was limited for life. But there was a distinction taken between the bequest of the use of the thing personal and the bequest of the thing itself. Thus, where the will was that A. should use such a thing during his life, and afterwards that B. should have it, the limitation over was agreed to be good; but if the first disposition had been of the thing itself to one for life, and after to another, then the bequest over

would have been void. But the doctrine has gradually obtained, and is now settled, that such limitations over in a will, or by way of trust, are good.

IV. The degree or quality of the property acquired by persons taking a limited or restricted interest for life in chattels under testamentary dispositions or limitations of trust.

The property itself is not liable to be taken in execution for the debts of the holder for life. But creditors would be entitled to the dividends of chattels, or money in the stocks, or to rents and profits during the life of *cestui qui vie.* Nor can it be voluntarily subjected to the demands of creditors by the *cestui qui vie,* nor can it be pawned or disposed of in any way to bind the ulterior executory interests. And a court of equity will interfere to protect ulterior limitations, by the appropriate remedy, whenever endangered by the act of the first taker, or by a stranger.

CHAPTER THE SECOND.

GENERAL QUALITIES OF EXECUTORY DEVISES.

I. A CONTINGENT remainder may be limited at common law; an executory devise is only admitted in a last will and testament. A contingent remainder relates only to lands, tenements, and hereditaments, real or mixed; an executory devise relates to personal estate as well as real. A contingent remainder requires a preceding estate of freehold to support it; an executory devise does not. A contingent remainder must vest at the furthest at the instant of the determination of the preceding estate; no such necessity exists for an executory devise. But the great and essential difference between the two consists in this, that contingent remainders may be barred and destroyed, and prevented from taking effect by several different means; whereas, it is a rule that an executory devise cannot be prevented or destroyed by any alteration whatever in the estate out of which or after which it is limited.

II. But if the preceding limitation in the devise should be in tail, with a subsequent limitation of the fee, then the subsequent limitation will not be an executory devise, but a remainder expectant on an estate tail.

Thus, a limitation to A. in fee simple, and if A. die without issue, then to B. and his heirs, this is a good executory devise, and cannot be barred or destroyed by any act of A.; but if the devise had been to A. in tail,

the subsequent limitation would have been a remainder, and might be destroyed. We have already seen that a limitation in a will shall be construed a remainder when this can consistently be done.

III. Executory bequests in chattels are equally as secure as executory devises in real estate against the disposition of the first legatees of the preceding or limited interests therein.

IV. But a release from the devisee of the executory interest to the first taker will discharge that executory interest.

V. A recovery by tenant in fee simple will not bar an executory limitation subsequently limited; but where an estate tail is first limited, and then an executory or conditional limitation is made upon that estate, a recovery suffered by the tenant in tail will bar such executory or conditional limitation.

Because one of the incidents, as we have already seen, inseparably annexed to an estate tail, is the bar by a common recovery.

VI. The contingency upon which an executory devise is to take effect must happen within the time of a life or lives in being and twenty-one years thereafter, allowing some months for gestation.

Unless there were some limit within which an executory devise shall take effect, it would be in the power of a testator to make an estate unalienable for generations

to come, and render it useless, to this extent, to the purposes and calls of a commercial society. This power of creating perpetuities the law denies beyond those limits which are deemed reasonable. The same rule prevails in regard to disposition of personal estate. It seems also that future and shifting uses, and other springing and executory interests, which are not remainders, are to be considered as subject to the limits against perpetuity as executory devises.

CHAPTER THE THIRD.

OF EXECUTORY ESTATES LIMITED UPON A FAILURE OF HEIRS OR ISSUE.

I. WHEREVER an executory devise is limited to take effect after a dying without heirs, or without issue, subject to no other restriction, the limitation is void.

As, where lands are devised to A. and his heirs, and if A. die without heir, then to B., this limitation is absolutely void. So, where A. devised to J. B. and his heirs forever, and if J. B. should die without any heir, then he devised the estate to C.; the limitation to C. was held void, because too remote.

It is to be observed here that the words "dying without heirs, or dying without issue," are not construed to mean a dying without heirs or issue living at the time of the death of the first taker, for then the devise would be good; but they are construed to mean a failure of heirs or issue at any indefinite period after the death of the first taker, in which case the rule against perpetuity prevails. It is to be further remarked that such void devises do not take effect and remain good until the prescribed limits are reached, but are utterly void and fail to take effect *ab initio*.

II. The like rule holds in the limitation of a term or personal estate, viz.: that a disposition thereof to take effect after failure of heirs of the body, or dying without issue, without other restriction, is void.

For instance, where a man possessed of a term devised it to one and the heirs male of his body, and for default of such issue to another and the heirs male of his body, this was adjudged a void remainder; for, if it should be suffered, a man might make perpetuities of a term.

III. The limitation of a personal estate to one in tail vests the whole estate in him.

So, where a testator by his will devised that 400*l.* should be put on good security for his son T., that he might have the interest of it for his life, and for the lawful heirs of his body, and if it should so happen that he should die without heirs, it should go to his youngest son, J. B.; it was decreed that the whole vested in the first taker, and the limitation over was too remote. And the rule is that the same words that make an estate tail in real property will imply an estate tail in personal property, subject to the more liberal construction allowed to a will.

IV. But, although a devise over after a dying without heirs is in general void, yet the rule is not without exceptions; for, if the person to whom the limitation over is made be a relation of and capable of being collateral heir to the first devisee, in that case the first devisee takes an estate tail.

So, where A. devised lands to his wife for life, then to his son H. for life, remainder to his son G. and his heirs forever, and if he should die without heirs, then to his two daughters; this was determined to be an estate tail in G. The reason is that it was impossible for G. to die without heirs whilst his sisters were living; and

that, consequently, the testator, by the word "heirs," could only mean heirs of the body. But, wherever the remainder, after dying without heirs, is limited over to one who is not heir to the first devisee, such after limitation does not alter the preceding positive devise in fee; nor will the courts, it seems, in that case, go so far as to restrain the general import of the word "heirs" to that of the words "heirs of the body."

V. If a devise be made to one and his heirs, and be followed by an executory devise over, limited to take place on an event which must happen within the compass of a life in being, the executory devise over is good.

As, where a testator devised to A. and his heirs, and if he should die before twenty-one, then to B. and his heirs; this was a good executory devise to B.

VI. Upon the same principle, though an executory devise to vest on a dying without issue generally, is not good, because too remote, yet, where the dying without issue is restrained to the period of a life in being, an executory devise thereon limited will be good.

VII. An executory devise of a term and the limitations of the trusts of a term are governed by the same rules.

As, where a testator, possessed of a term of years, devised the lands to B. and to the heirs of his body, and if B. should die without issue, living C., then to C. The limitation to C. was a good devise, the contingency being to arise within the compass of a life in being; and

the same rule prevails if the term had been limited in trust.

VIII. An executory devise over, to take effect on the decease of the first devisee without issue, is good, if the dying without issue be confined to the compass of twenty-one years after the period of a life in being.

Where a testator devised lands to his grandson, W., and his heirs, and if W. should die under age, then to his grandson, T., and if T. should die under age, then to such other son of the body of his daughter M. S., by his son-in-law, T. S., as should happen to attain his age of twenty-one years, remainder over. Testator died, leaving two grandsons, W. and T., who both died under age; afterwards, another son, A., of the body of M. S. by T. S., was born, and it was decreed a good executory devise to this after-born son A., if he should attain his age of twenty-one years. This was adjudged a good devise, as the contingency was to arise within twenty-one years after the life of a person in being.

IX. In executory devises of terms for years, or other personal estates, the Court of Chancery has very much inclined to lay hold of any words of the will which seem to justify them in construing the words "dying without issue" to mean a dying without issue living at the time of the person's decease.

The present force of words in the English language would not now permit us to give any other meaning to these words than the very meaning which the Court of Chancery in this case were anxious to carry over into

them. But such was not the case formerly, and these words then meant a dying and also a failure of issue or descendants at any time afterwards.

X. But in a devise of real estate the usual construction of these words prevails.

And this in favour of the heir, whose interest is much regarded by the law.

XI. In cases of personal estate, where such restrictive circumstances as have been mentioned appear, it matters not whether the term or other personal estate be limited to the first devisee or legatee indefinitely, or for life expressly, or to him and his heirs, or the heirs of his body, or to his issue or children, as the restriction is equally valid under any of these circumstances, and gives effect to the limitation over.

XII. The construction of the words "dying without issue," in a bequest of personal estate.

It is to be observed that (*a*) the words "heirs of his body" constitute an express limitation of an estate tail; (*b*) the words "dying without issue" constitute an implicative limitation of an estate tail.

Now, in both cases, whether the (*pseudo*) estate tail in the first taker be by express or by implicative limitation, the devise over is too remote and void, and, therefore, the whole vests in the first legatee; but with this qualification, that if there are other words or indications of intention in the will which go to show that the testator meant only a failure of issue at the death of the first taker, then the devise over is good.

XIII. With respect to the validity of the limitation over, it is the same thing in bequests of personal estate, whether the first bequest be to one for life expressly, and if he die without issue, remainder over; or to one (indefinitely), and if he die without issue, remainder over.

Thus, in a devise to A. for life, and if he die without issue, remainder over to B., the remainder is void. So, where a testator devised a term to trustees in trust for his son T., for so many years of the term as he should live, and after his decease, in trust for the issue male of T. lawfully begotten, for so many years of the unexpired term as such issue male should live, and when the issue male of his said son should happen to be extinct, then in trust for his second son W. for life, remainder over, &c., and made T. sole executor and residuary legatee, T. died, without issue male; though it was held, in this case, that the subsequent limitation to the issue did not enlarge the express estate for life given to the first devisee; yet it was also held that the remainder over upon the extinction of issue male (which is equivalent to a dying without issue, when taken as an indefinite failure of issue) was void; and that T. became entitled to it by the residuary bequest to him.

This distinction remains to be noticed; though it seems that wherever a term is devised to one for a day, or an hour, it is held to be a devise of the whole term, if the devise over be void, and it appears to be the intention of the testator to dispose of the whole from his executors, yet, if such intention do not appear, then it has been held that a limitation of a term to one for life does not vest the whole so absolutely in him as to be a

his disposal, but leaves a possibility (viz., upon the death of the legatee within the term) of reverter in the executors of the testator. Thus where A., possessed of a term of 99 years, devised it to B. for life, and then to C. for life, and so on to five others successively for life; after the death of all seven, upon the question who should have the residue of the term, it was adjudged to revert to the executors of the testator.

XIV. Though an executory devise in tail or in fee to one *in esse* after a dying without issue is void, yet an executory devise for life to one *in esse* to take place after a dying without issue, may be good.

Thus where A., tenant for life, demised to trustees for 99 years, if she should so long live, in trust for herself during her widowhood, and after her marriage, then in trust for C., her second son, and the heirs of his body, and if he died without issue, then in trust for D., her next son; upon the question whether the limitation over to D. was good, it was said that the only objection to limiting a term to one and the heirs of his body, and then over in default of issue, was, because it would make a perpetuity; but here the whole term was to determine on A.'s death, there could be no perpetuity; nor, indeed, could there be; for the subsequent limitation could not possibly take effect, unless it was in the lifetime of A.

CHAPTER THE FOURTH.

OF OTHER MATTERS RELATING TO EXECUTORY DEVISES.

I. If personal estate be bequeathed to one for life, and afterwards to the heirs of his body, these words are generally words of limitation, and the whole vests in the first taker; but if there appear any other circumstance or clause in the will to show the intention that these words should be words of purchase and not of limitation, then it seems the ancestor takes for life only, and his heir will take by purchase.

That is, that the rule in Shelley's case generally applies in bequests of personal estate, though it easily yields to words of a contrary intention. The rule is even less rigidly enforced than in the case of a will, and these bequests are construed rather according to the rules which govern marriage settlements, which we have already seen. But if there be no words of contrary intention, the rule in Shelley's case applies, and as there can be no descent in things personal, the whole vests in the first taker. Thus where a term was limited in trust for S. during her life, and immediately from and after her decease, to the heirs of the body of S. lawfully to be begotten, if the term should so long endure, and in default of such issue to B.; it was held that the whole term vested in S. Here there were no words of intention to control the rule.

In another case, a term was settled in trust for one

if she should so long live, and after her decease in trust for her husband, if he should so long live, and after his decease in trust for the heirs of the body of the wife begotten by the husband, and their executors, administrators and assigns; it was held that the words executors, &c., controlled the rule, and that only an usufructuary interest for life was given, and that the property vested in the heirs of the body.

II. It seems formerly to have been held in some cases that an executory devise of a term to a person not *in esse* was void; but it is now settled that any executory devise, whether to a person *in esse* or not, is good, if confined to take effect within the limits allowed by law.

III. Certain limitations of subsisting leases for lives neither have the effect of regular limitations of estates of inheritance, nor yet operate as executory devises.

Thus if a person seized of an estate *per autre vie*, or for any number of lives in existence, devise it to one (indefinitely or for life), and to the heirs of his body, or in such a manner as would give him an estate tail in lands of inheritance, these limitations.

(*a*) Do not create an estate tail proper, but carry the estate over to the heirs of the body by purchase.

(*b*) They are not executory devises, properly so called, because the whole does not vest in the first taker.

But the first taker under such limitation may dispose of the whole and bar his own issue and remainders over by lease and release, or by any other conveyance proper for passing estates of freehold. It is otherwise where an

estate *per autre vie* is limited to one for life, remainder to B. for life; in this case the first taker cannot bar the remainder.

IV. Any limitation in future, or by way of remainder, of lands of inheritance, which in its nature tends to a perpetuity, even though there be a preceding vested freehold, so as to take it out of the description of an executory devise, is considered void in its creation.

Thus in the case of a limitation of lands in succession, first to a person *in esse*, and after his decease to his unborn children, and afterwards to the children of such unborn children, this last remainder is absolutely void. And it is upon this principle that the constant practice of limiting an estate tail to the first and other sons in marriage settlements is founded; for though a child unborn might take an estate for life, as well as an estate tail, yet such estate would not extend to the issue of such child, and no estate limited to such issue, as purchasers, would be good.

V. Wherever one limitation of a devise is taken to be executory, all subsequent limitations must be likewise so taken.

An executory devise may confer an estate in fee simple, or a less estate. On every estate conferred by an executory devise, another executory devise may be limited; and, if the estate conferred by an executory devise be an estate in tail, for life, or for years, it may be followed by a remainder; but while the executory estate, after which the remainder is to arise, is in suspense, it is not properly a remainder, but a right, which

is to be converted into a remainder on a particular event. Thus, if land be devised to A. and his heirs, and, if A. should not leave issue living at his decease, to B. for life, and after B.'s decease, to C. in fee; the limitation to C. would immediately vest in him a fixed right to a remainder in fee, if A. should die without issue in B.'s lifetime, and to an estate in fee simple in possession, if A. should survive B., and afterwards die without leaving issue; but during A.'s life, C. would only have an executory fee.

VI. Exception to the last rule.

But notwithstanding the rule that if one limitation be executory, every subsequent one must be so likewise; yet a preceding executory limitation may be uncertain and contingent, when a subsequent limitation, though it be to take effect in future, may not be uncertain or conditional, but may be so limited as to take effect, either in default of the preceding limitation taking effect at all, or by way of remainder after it, if that should take effect. As where there was a devise to two trustees and their heirs to receive the rents until B. should attain twenty-one, and if B. should attain twenty-one, or have issue, then to B. and the heirs of his body; but if B. should happen to die before twenty-one and without issue, remainder over. B. attained the age of twenty-one, and afterwards died without issue. It was decreed that the remainder over should take effect upon the apparent intent of the testator that it should take place, either in default of B.'s attaining twenty-one, or his dying without issue.

VII. When a devise is made after a preceding execu-

tory or contingent limitation, or is limited to take effect on a condition annexed to any preceding estate, if that preceding limitation or contingent estate never should arise or take effect, the remainder will nevertheless take place, the first estate being considered only as a preceding limitation, and not as a preceding condition, to give effect to a subsequent limitation.

As where A., possessed of a term for years devised it to his wife for life, and after her death to the child she was *enceinte* with, and if such child should die before the age of twenty-one, then one-third part of the said term to his said wife, and the other two-thirds to certain other persons; one question was, whether the devise to the wife was good as the event happened; because the wife was not *enceinte,* and so the contingency upon which the devise was made to her, viz., the child's death under twenty-one years of age, never happened. The devise was held good.

VIII. Whatever number of limitations there may be after the first executory devise of the whole interest, any one of them which is so limited that it must take effect, if at all, within twenty-one years after the period of a life then in being, may be good in event, if no one of the preceding executory limitations, which would carry the whole interest, happens to vest; but if the preceding executory limitation does not carry the whole interest, a subsequent one does not necessarily fail, if the preceding limitation takes effect.

It is evident from the very nature of such limitations that where the "whole interest"—which means the

entire estate of inheritance in fee simple—has once vested, no ulterior limitation can take effect. But if this whole interest does not vest at all, but fails to take effect, as if an estate be devised to A. and his heirs, and if A. shall die without a son living at the time of his death, then to B. in fee; here if A. die, leaving no son, the subsequent ulterior limitation will vest, of course. But where a devise does not carry the whole interest, but some less estate, as if lands were limited to the use of A. and his heirs, and if he should have no child living at his decease, to the first son of B. who attains twenty-one years, in tail, remainder to C. in fee; in this case, during the life of A. both subsequent limitations are executory, and the limitation to B.'s son conferring an estate tail, and not an estate in fee simple, the limitation to C. operates as conferring on him a fixed right to an estate in fee simple in possession, if A. leaves no child, and B. has no son who attains twenty-one years; and to an estate in fee simple in remainder, expectant on the estate tail of the son of B., if A. should leave no child, and B. should have a son who attains that age. It is, of course, to be understood that these limitations are void where they exceed the limits of perpetuity.

IX. When there is a preceding vested limitation, and a future estate or interest is limited to take effect at too remote a period, or where there is no preceding limitation, and a future estate or interest is immediately limited to take effect at too remote a period, the future limitation is void in its creation.

But executory limitations engrafted upon estates tail

are to be excepted from this rule, for they do not come within the reason of the rule against perpetuity, because they may be barred by a common recovery suffered by a tenant in tail. Thus, if land were limited to A. in fee simple, and if A. shall have no child who shall live twenty-five years after his death, then to B., the limitation to B. would be too remote, and hence void; but if a similar limitation were made to A. in tail, the remainder to B. would be good, for the reason assigned.

X. When an estate of freehold is limited, with a limitation over by way of remainder in contingency, and the estate of freehold (as by the death of the devisee in the testator's lifetime) becomes incapable of taking effect, and the limitation over is in contingency at the testator's decease, the limitation will have effect as an executory devise.

Thus, where A. devised lands to trustees in trust for B. for life, and after his decease for the first and other sons of B. successively, in tail male, remainder to the future sons of C. for life successively, with divers mean remainders, remainder over to D.; B. died without issue in the lifetime of the testator, and afterwards the testator died before any of the contingent remainders were vested; the question was whether the mean contingent remainders were not become void, there being no preceding estate to support them? It was held they should enure by way of executory devise. But where a preceding freehold has once vested, it seems no subsequent accident will make a contingent remainder enure as an executory devise; and this, as a direct consequence of the rule above given, that whenever a devise may be

construed as a contingent remainder, it shall never be considered as an executory devise.

XI. Though a condition to determine an estate tail as to a particular person only is void, it has been held that a rent may be granted on a condition to cease during the nonage of any heir of the grantee.

It was held that where a feoffment was made in fee, upon condition that if the feoffee die, his heir being under age, his estate should cease during the minority of the heir, such a condition is utterly void. But if this had been a grant of a rent newly created, instead of land, the condition would have been good. And if a rent be limited to a man and his heirs, a power may be given to the grantee and his heirs, if the rent be in arrears, to enter and hold till the payment of the arrears, and this right will follow the descent and alienation of the rent.

XII. A rent *de novo* may be granted to commence *in futuro;* and offices and dignities may, under qualifications, be granted by the king to commence *in futuro.*

XIII. Estates shall not cease as to part and vest and revest.

A testator having devised lands to trustees and their heirs, in trust for J. in strict settlement, with divers remainders over in strict settlement, subjoined a proviso in the will, that so often as and during such times as the person who for the time being (in case the testator had not otherwise directed) would have been entitled in possession as tenant for life or tenant in tail, should be

under the age of twenty-six years, then the trustees were to enter and receive all the rents and profits of the lands; out of which they were to allow certain sums for the maintenance of such tenant for life or in tail, and the rent was to accumulate, to be laid out in the purchase of lands to be settled to the same uses. J. died upwards of twenty-six years of age, leaving his wife *enceinte* of a son; and upon a case sent from the Court of Chancery to the Court of King's Bench for their opinion, whether the trustees, upon the birth of the said son of J., took any and what estate in the lands, by virtue of the said proviso; they certified their opinion that the trustees did not take any estate in the lands by virtue of the said proviso.

XIV. Distinction between executory limitations *per verba de presenti* and *per verba de futuro.*

It has been held that where an executory devise is limited *per verba de presenti,* that is, where the devisee is mentioned as a person in existence, and the commencement of the estate devised is not expressly referred to a future period, there the devisee must be a person capable at the death of the devisor, or otherwise the devise will be void; as if one devise (immediately) to the heir of J. S., and J. S. is living at the death of the testator, it is said the devise shall not be construed an executory devise, and must therefore be void; but that if it were to the heir of J. S. after the death of J. S., then it would be good as an executory devise, because a future time is mentioned. But it seems to be now settled that whatever force is to be allowed to the distinction between executory limitations *per verba de presenti* and *per*

verba de futuro, it can only affect those cases where there is not the least circumstance from which to collect the testator's contemplation or intention of anything else than an immediate devise, to take effect *in presenti*.

XV. Whenever there is an executory devise of a real estate, and the freehold is not in the meantime disposed of, the freehold and inheritance descend to the heir at law.

As where the testator devised lands to A. for five years from Michaelmas then next, remainder to B. in fee, and died before Michaelmas, it was held that the freehold and fee simple descended to the heir at law till Michaelmas.

XVI. But a devise of all the rest and residue of the real estate will pass as well the profits from the testator's death up to the time of the estate's vesting, as from the determination of the first estate to the vesting of a subsequent one.

As where a testator devised all the rest and residue of his real and personal estate, of what nature or kind soever, to such child or children as his daughter should have; it was held that the profits from the testator's death to the birth of a child of his daughter should pass under this devise.

XVII. Where there is no residuary devise, or other particular disposition of them, it seems that the profits of a personal estate between the death of the testator and the vesting of an executory estate, or between the de-

termination of the first limitation and the vesting of a subsequent one, will accumulate for the benefit of the person next to take by virtue of the limitations.

Thus, where a testator devised a share in a brewery to an infant, provided that infant should attain the age of twenty-one years, but if he should die before that age, then to B., it was decreed that the profits from the testator's death until the infant should attain the age of twenty-one should belong to the infant on his attaining that age. The infant died before attaining that age, and it was decreed that the intermediate profits belonged to B., and not to the infant's administrator.

XVIII. When an absolute property is given in lands, and a particular interest in the meantime, till the devisee comes of age, the estate vests in him immediately, subject to the particular interest.

As upon a devise to A., to the use of B. till B. attained the age of twenty-one, and then to B. in fee; it was held that the fee vested immediately in B.

XIX. Possibilities of personal estates are assignable and devisable in equity.

As where a testator possessed of a term of one thousand years, devised it to B. for fifty years, if she should so long live, and after her decease to C., and died; C. assigned it to D. during the life of B.; this assignment was held good.

XX. An executory interest, whether in real or per-

sonal estate, is transmissible to the representatives of the devisee, when such devisee dies before the contingency happens.

XXI. In cases of contingent or executory interests, the Court of Chancery will interfere in behalf of the persons entitled to such interests, to prevent unreasonable waste being committed by the tenants in possession.

THE END.

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I cannot too strongly express my obligations to Mr. Biddle, of the Master of the Roll's Chambers, for his assistance in the preparation of this edition. The whole book has been revised by him; and I have throughout received from him very valuable suggestions. He has also relieved me of much labour by revising and annotating the forms annexed to the rules, and in many other ways.

I wish particularly to notice the Table of Cases, which Mr. Biddle has prepared. The course ordinarily adopted throughout the book is to cite each case with a reference to only one report of it, except where there appeared special reason for referring to another. The Law Reports are commonly cited where the case has appeared in that series. To have mentioned in the body of the work every report of each case would have been a cumbrous and I think an inconvenient plan. On the other hand, many practitioners use series of reports other than those commonly cited in this Book. To meet the difficulty thus arising, the Table of Cases gives a reference to all the reports of each case cited.

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